Supreme Court, U.S.
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In The
Supreme Court of the United States

GEORGE A. SMITH,

Petitioner,

vs.

WILLIAM STEVEN RIGG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a no-fault workers' compensation personal injury claim filed against the State of California equitably toll the statute of limitations for a constitutional claim brought under 42 U.S.C. § 1983 against an individual prison warden when the § 1983 claim is based solely on an entirely "different wrong" (work-related personal injury v. U.S. Constitutional First Amendment rights), and there is no evidence that the prison warden was aware of the contents of the workers' compensation claim?

2. May a court impose respondeat superior liability under 42 U.S.C. § 1983 upon a defendant California prison warden for conduct of subordinates under his command where no evidence is presented that the defendant warden personally participated in, knew of, or ratified the acts but instead on the unsupported judicial observation that the warden "must have known what was going on"?

3. May a court impose liability under 42 U.S.C. § 1983 upon a defendant California prison warden for speech concerning a whistleblower where the comments do not specifically mention the name of the whistleblower and are unaccompanied by any adverse consequences to the whistleblower?

LIST OF PARTIES

The Petitioner is George A. Smith. The Respondent is William Steven Rigg.

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PETITION FOR WRIT OF CERTIORARI

George A. Smith ("Petitioner") respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding March 20, 2002. Despite the fact that workers' compensation claims are limited to actions brought against employing entities, are part of a no-fault strict liability system, and are limited to personal injuries, the Ninth Circuit held that Respondent's workers' compensation stress claim against the State of California equitably tolled the statute of limitations on Respondent's § 1983 claim based on First Amendment rights against Petitioner as an individual. The Ninth Circuit reasoned that equitable tolling was appropriate because Respondent may have believed that such a delay was in the best interest of prison inmates. The Ninth Circuit's ruling also allowed allegations against Petitioner to go forward despite acknowledging that no evidence existed to show that Petitioner was involved in, or even aware of, the alleged retaliatory acts. The Ninth Circuit reasoned that because the alleged retaliatory acts were committed by Petitioner's subordinates, Petitioner must have been aware of their actions. Therefore, review by this Court is in order because the Ninth Circuit departed from well-established Supreme Court maxims and federal principles in a manner that conflicts with decisions of other circuits, conflicts with decisions of this Court, and represents a far-reaching departure from guidelines of this Court and the purposes of 42 U.S.C. § 1983.

OPINIONS BELOW

The Opinion and Order of the District Court for the Eastern District of California granting summary judgment in favor of Petitioner is not officially reported and is reprinted in the Appendix at App. 11-60. The Opinion of the United States Court of Appeals for the Ninth Circuit is not reported and is reprinted in the Appendix at App. 1-9. The Order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's request for rehearing and rehearing *en banc* is unreported and is reprinted in the Appendix at App. 62-63. The Order of the United States Court of Appeals for the Ninth Circuit granting Petitioner's request for a stay pending this Petition is unreported and is reprinted in the Appendix at App. 10.

JURISDICTION

Petitioners seek review of the ruling of the United States Court of Appeals for the Ninth Circuit, dated March 20, 2002, affirming in part and reversing in part the Order issued by the United States District Court of the Eastern District of California, which granted Petitioner's motion for summary judgment and dismissed Respondent's complaint. The Ninth Circuit held that 1) Respondent established an exception to the statute of limitations under the doctrine of equitable tolling; 2) Petitioner was not entitled to qualified immunity; and 3) A factual dispute was presented as to whether Petitioner exhibited deliberate indifference to retaliatory behavior against Respondent. On April 10, 2002, Petitioner requested a rehearing *en banc* from the U.S. Court of Appeals for the Ninth Circuit. By the Order dated May 22, 2002, the court

denied this request. On May 31, 2002, Petitioner requested a stay of mandate pending petition to this Court for a writ of certiorari. By the Order dated July 1, 2002, the court granted this request. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Petitioner files this request for certiorari within the time allotted in accordance with Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

U.S. Const., Amendment I ("Freedom of Speech") provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This is a First Amendment abridgement of free speech action brought under 42 U.S.C. § 1983, thereby conferring general federal question jurisdiction upon the district court. Respondent Lieutenant William Steven Rigg ("Rigg" or "Steve Rigg") is a former employee of the California Department of Corrections ("CDC"). Steve Rigg claims that his protected speech was silenced through "retaliation" by George A. Smith ("Petitioner").

The substance of Rigg's claims is that Steve Rigg's vocal opposition to the policies at Corcoran State Prison ("Corcoran") (his cooperation with a Federal Bureau of Investigation ("FBI") investigation of alleged inmate abuse), resulted in reprisals that were either initiated or condoned by Petitioner.

I. Statement of Facts

Petitioner was the Warden at Corcoran State Prison from January 1993 to July 31, 1996. Petitioner did not directly supervise Rigg. Instead, there were two levels of supervision between Petitioner and Rigg.

In 1988, Rigg transferred to Corcoran State Prison as a correctional officer. In 1994, allegations emerged that correctional officers at Corcoran were pitting rival inmates against one another in hand-to-hand combat and using deadly force against inmates unnecessarily. These claims

were never substantiated and all related criminal trials resulted in quick acquittals.

In the early summer of 1994, Rigg asserts that Associate Warden Farris told him to ignore a CDC memorandum from CDC Deputy Director David Tristan on the use of the .37 millimeter gas gun. As a result, in July 1994, Rigg complained to CDC headquarters in Sacramento that the CDC's shooting policy was being ignored at Corcoran.

In August 1994, as a result of his complaint, Rigg alleges that he was questioned by Corcoran Associate Wardens Bruce Farris and Marvin Meske. Rigg claims that at this meeting he was threatened with termination for going to headquarters, outside of the chain of command. (S. Rigg Decl. ¶ 7.) Rigg provides no evidence that the meeting or the alleged threats were authorized by Petitioner.

In the summer of 1994, Rigg, along with Richard Caruso, a Correctional Officer at CDC within Rigg's chain of command, began to take confidential documents out of Corcoran. (Rigg Deposition in *Tate v. Gomez* 315:4-316:3.) In an effort to prevent further security breaches, Petitioner reassigned Rigg from his position as a 4-A Relief Lieutenant. (Pls.' Exh. 9, Smith Depo., *Caruso v. California*, at 143:21-144:10.) Rigg provided no evidence rebutting Petitioner's legitimate reason but claims without evidentiary support that this reassignment was a punitive job change as a result of Rigg's meetings with the FBI. (S. Rigg Decl. ¶ 10.) In any event, there is no suggestion that the transfer affected tangible benefits such as pay, hours, or promotion potential. (*Id.*) Around this time, Rigg also claims that Smith and his subordinates prevented Rigg from receiving training at Galt Academy. (S. Rigg Dec.

¶ 28.) Again, however, Rigg offers no evidence that Petitioner was responsible for training decisions or this decision in particular, to support his claim that Petitioner gave these orders.

In response to two newspaper articles published October 29, 1994, Petitioner called a staff meeting, which included correctional officers, including Steve Rigg. Petitioner was upset that an "anonymous" source in the two articles specifically identified Corcoran officials as being investigated for wrongdoing, and he wanted to boost the morale in the prison. (Pls.' Exh. 9, Smith Depo., *and Caruso v. California*, at 63:25-64:20.) Petitioner explained that he was upset at the anonymous reports because the reports named individuals who were not involved in the dispute, thereby unnecessarily jeopardizing the safety of those individuals. (*Id.*) At the meeting, Smith stated that he was "mad as hell," that people would do something like this to their fellow staff members to jeopardize their lives. (*Id.* at 65:11-15) Petitioner "never mentioned anybody by name" at the meeting. (*Id.* at 67:16-17.)

In April 1995, Petitioner approved Rigg's transfer request to High Desert State Prison, a newly staffed institution within the CDC. (Smith Decl. Exhs. A & B.) Although Rigg's transfer had been approved, on May 22, 1995, Rigg sent a letter to Smith requesting that he be allowed to participate in formal training at Galt Academy. (Pls.' Exh. 20.) Rigg complains that he never received a response to this request. Again, Rigg presented no evidence that Petitioner was involved in any way with the decisions regarding Rigg's training.

II. Procedural History

On October 21, 1994, Rigg filed a workers' compensation claim for stress caused by threats of "termination, demotion, adverse action, [and a] punitive job change because of [his] refusal to violate state law or departmental policy." On December 15, 1994, Rigg filed a second workers' compensation claim, alleging that stress was causing him to suffer from high blood pressure. (Pls.' Exh. 3.) Rigg filed a third workers' compensation claim on March 6, 1995, also alleging stress. (Pls.' Exh. 6.)

Not until November 4, 1997 did Rigg file his § 1983 claim based on his First Amendment free speech rights in federal court against Petitioner.

On September 29, 2000, the district court dismissed all of Rigg's claims based on the fact that the statute of limitations had run as of November 4, 1996 and that all of Rigg's allegations against Petitioner had, without dispute, occurred prior to that date. Alternatively, the district court held that with the exception of the alleged transfer, each of the allegations against Petitioner were either not adverse or not causally connected to Petitioner's conduct.

On March 20, 2002, the Ninth Circuit overturned the district court in part. In so doing, the Ninth Circuit allowed the following allegations against Petitioner to go forward: 1) Rigg alleges that in August of 1994, he was threatened with termination by associate wardens for going outside the chain of command; 2) Rigg alleges that on October 8, 1994, he was punitively transferred to a less desirable position by Petitioner; 3) Rigg alleges that on October 31, 1994, Petitioner spoke to the prison guards and criticized whistleblowers; and 4) Rigg alleges that Petitioner prevented him from receiving training in 1995. All of these actions allegedly occurred more than two years prior to the filing of the complaint.

In so holding, the Ninth Circuit held that Rigg's delay in filing his § 1983 claim was excusable because "he had hoped that a transfer to another prison, rather than a lawsuit would make the retaliation stop. Under these circumstance, Rigg might have reasonably concluded that forcing a lawsuit immediately might make things worse in the prisons, not only for the officers and those guards trying to ameliorate conditions, but perhaps also for the inmates." (App. 5.) Apparently, the mere possibility that Rigg's delay was motivated by good intent was sufficient for the Ninth Circuit's panel to approve a lengthy delay in the filing of his § 1983 claim for three years.

Equally perplexing was the Ninth Circuit's ruling with respect to Petitioner's responsibility for the allegations allowed to go forward. "While Smith was culpable directly for only some of these acts of retaliation, a reasonable jury could find that Smith was 'aware of a specific risk of harm' to Rigg, and did nothing to prevent it from happening under his watch by those under his command." The Ninth Circuit re-wrote the law of respondeat superior in § 1983 actions since it conceded there was no evidence that shows Petitioner was even aware of many of the alleged retaliatory acts.[1]

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[1] The Ninth Circuit states that the fact that, 1) Rigg was threatened with termination by associate wardens, 2) Rigg was transferred to a less desirable position by Petitioner, 3) Petitioner vilified whistleblowers in front of prison employees, and 4) Rigg was prevented from receiving training by Petitioner's associates, shows that Petitioner was "aware of a specific risk of harm" to Rigg with respect to all of Rigg's allegations, even those not linked to Petitioner.

REASONS FOR GRANTING THE WRIT

I.
Introduction

Smith petitions for a writ of certiorari on four grounds. First, the Ninth Circuit ruling directly contravenes this Court's ruling in *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454 (1975). In *Johnson*, this Court held that only where there is a complete identity of causes of action could courts properly assess whether the affected party is given sufficient notice to justify equitable tolling. *Id.* at 468, fn. 14. Workers' compensation claims and § 1983 claims involve different wrongs, different defendants, and different burdens of proof. Clearly, there is a lack of sufficient identity to properly notify an unnamed defendant of a possible lawsuit.

Second, the Ninth Circuit's application of equitable tolling violates long-standing Supreme Court maxims of repose, thereby contravening important purposes of 42 U.S.C. § 1983, including uniformity of limitation periods and certainty. Neither this Court nor any circuit has ever held that the filing of a § 1983 claim alleging a First Amendment violation may be equitably tolled by a no-fault state workers' compensation claim. By disposing of the requirement that each claim must address the same wrong and the same defendant, the Ninth Circuit has expanded the application of equitable tolling in a manner that leads to absurd and unpredictable consequences not intended by Congress when drafting the § 1983 legislation. At its core, this case begs the question of whether the Ninth Circuit's ruling violates the purposes of § 1983 by ignoring basic Supreme Court maxims of repose. The answer ultimately requires this Court to determine whether there is a minimum level of protection to be provided by the statute

of limitations in § 1983 cases or whether lower courts may apply equitable tolling in a manner that is both inconsistent with this Court's prior rulings and eviscerates the very purpose of the statutes being extended.

Third, the Ninth Circuit's decision to allow allegations to go forward without evidence of personal knowledge or involvement by the individual defendant is in direct conflict with this Court's holding in *Farmer v. Brennan*, 511 U.S. 825 (1994); *Board of County Com'rs of Bryan County, Okl. v. Brown*, 52 U.S. 397 (1997); *City of Canton v. Harris*, 489 U.S. 378 (1989); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978); *West v. Atkins*, 487 U.S. 42, 53, fn. 12 (1988) (holding that respondeat superior cannot be the basis for liability under § 1983).

Lastly, the Ninth Circuit's decision to allow allegations of harmful speech to go forward without evidence that Petitioner's conduct resulted in an adverse action is in direct conflict with the very Constitutional rights § 1983 seeks to protect.

II.
The Ninth Circuit's Application Of Equitable Tolling Contravenes § 1983 Purposes

This Court has held that lower courts are to borrow the state personal injury statute of limitations for purposes of § 1983 claims. *Wilson v. Garcia*, 471 U.S. 261 (1985). This Court has emphasized the importance of the policies underlying state statutes of limitation. "Statutes of limitations are not simply technicalities, on the contrary they have long been respected as fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446

U.S. 478, 486 (1980). "Just determinations of fact cannot be made, when, because of the passage of time, the memories of witnesses have faded or evidence is lost. . . . The borrowing of statute of limitations serves these policies of repose." *Wilson v. Garcia*, 471 U.S. at 271 (1985). By borrowing the state statute of limitations and thereby adhering to policies of repose, this Court has sought to protect the legislative purposes of § 1983. "[T]he legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matter." *Id.* at 275.[2] By borrowing the one most appropriate statute of limitations, "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach." *Id.*

State equitable tolling principles may be applied to § 1983 claims so long as they do not conflict with these important federal interests. *Board of Regents v. Tomanio*, 446 U.S. 478, 485-486 (1980). Further, this Court has consistently recognized that the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. *Id.* Therefore, the application of equitable tolling necessarily effects the legislative purposes defined by this Court in *Wilson*. As

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[2] This Court noted further that "[o]n a human level, uncertainty is costly to all parties. Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing in confidence when their delicts lie in repose." *Id.*

discussed below, the Ninth Circuit's application of equitable tolling eviscerates the protections afforded litigants by the statute of limitations in violation of Supreme Court maxims of repose leading to absurd litigation tactics, thereby creating uncertainty inconsistent with the purposes of § 1983.

A. By Ignoring The "Same Wrongs" Requirement, The Ninth Circuit's Ruling Violates Well-Established Principles Of Notice And Similarity.

The application of equitable tolling by the Ninth Circuit in this case violates well-established principles concerning notice and similarity of claims. In this case, Respondent Rigg first filed a workers' compensation stress claim in 1994. He did not file a § 1983 claim until 1997, more than three years later. His § 1983 retaliation claim, which is based on conduct that occurred in 1994, missed the statute of limitations. The applicable state statute of limitations is one year, extending back to 1996, but not covering the 1994 conduct.

The Ninth Circuit, however, held that Respondent's workers' compensation claim, part of a no-fault personal injury system and filed against a different defendant, equitably tolled his federal § 1983 claim based on constitutional principles of free speech. These two claims contain utterly different wrongs.

The District Court, in a thorough and well-reasoned opinion, applied California's three-prong equitable tolling test and determined that the equitable tolling doctrine did not apply. It was undisputed that the doctrine of equitable

tolling only applies if the plaintiff meets three requirements: 1) timely notice; 2) sufficient legal and factual similarity between the two claims such that the defendant would not be prejudiced in the second claim; and 3) the plaintiff must have acted in good faith and in reasonable conduct in filing the second claim. *Collier v. City of Pasadena*, 142 Cal. App. 3d 917, 924, 191 Cal. Rptr. 681, 685 (1983). The District Court concluded that Rigg had failed to meet any of the three requirements.

The District Court found Rigg did not present evidence that Smith was on notice of a potential First Amendment retaliation lawsuit against him as an individual by the filing of the workers' compensation claim against the State of California. The District Court further concluded Rigg had failed to show that the prior workers' compensation claim and the § 1983 constitutional claim were so similar that Smith would not be prejudiced, explaining that the two actions were seeking to address two different wrongs. Finally, the District Court found Rigg had not demonstrated reasonable conduct in filing his claim against Smith until almost two and a half years after transferring out of Corcoran prison where the wrong assertedly occurred. (*See* Memorandum of Opinion and Order ("Order"), at 15-17, 19 (attached as Exhibit A hereto)).

The Ninth Circuit reversed the District Court, holding that equitable tolling applied to save Rigg's claims against Smith, and only Smith. It concluded that Rigg had satisfied the three-prong test *despite the concededly different alleged wrongs and defendants* in a personal injury stress claim and a § 1983 claim based on free speech violations. The panel's decision appears to have been significantly impacted by an expansion of or misreading of its own

decision in *Daviton v. Columbia/HCS Healthcare Corporation*. In footnote 3, the Ninth Circuit erroneously cited *Daviton*:

> [A]t the time of its decision, the district court did not have the benefit of *Daviton v. Columbia/HCS Healthcare Corporation*, 241 F.3d 1131 (9th Cir. 2001), which overruled *Fobbs v. Holy Cross Health System Corporation*, 29 F.3d 1439, 1445 (9th Cir. 1994) to the extent that it conflicted with *Cervantes v. City of San Diego*, 5 F.3d 1273, 1275 (9th Cir. 1993), *on the issue of whether a threshold requirement that the prior and current complaints address the same wrongs* and grant the same remedies before the three-part test of California law applies. *The law of this Circuit is that no such threshold inquiry is required before applying the three-part test. See Daviton,* 241 F.3d at 1133. (Memorandum Decision dated March 20, 2002 ("Memorandum") attached as Exhibit B hereto) (emphasis added).

The Ninth Circuit's decision conflicts with controlling precedent of all federal courts, including its own *en banc* decision in *Daviton*.[3] It has been undisputed that for equitable tolling to apply claims must have sufficient legal and factual similarity and there must

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[3] This Circuit is uniform as to the proper equitable tolling test to be followed by the Ninth Circuit: (1) timely notice; (2) sufficient legal and factual similarity between the two claims such that the defendant would not be prejudiced in the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim. *Daviton* at 1137-1138. This panel decision however disposes of any analysis into whether the two claims involve the same wrong thus creating a conflict as to the components of the three-prong test.

be notice. However, by eliminating the same wrong requirement, the Ninth Circuit in this case destroys the requisite components of legal and factual similarity essential to equitable tolling doctrine and policies of repose. Apparently misconstruing federal and state law precedent and its own decision in *Daviton,* the Ninth Circuit dispensed with both the same wrong *and* same remedy requirement. (*See* Footnote 3, page 4 of the Memorandum attached as Exhibit B).[4] This is contrary to all national precedent and policy.

In *Daviton*, the Ninth Circuit overruled *Fobbs v. Holy Cross Health System Corporation*, 29 F.3d 1439 (9th Cir. 1994). *Fobbs* added a "threshold" requirement that a plaintiff seek the same *remedies* (not merely relief for the same wrong) in each forum before it would apply California's equitable tolling rules. The *Daviton* Court held that a threshold requirement of identical remedies was incorrect law, thus overruling *Fobbs* in that *singular* respect.

As to the same wrong requirement, the *Daviton* Court reiterated that "California has long refused to apply the equitable tolling doctrine to toll the statute of limitations on a claim for a distinct wrong that was *not* the basis of the earlier proceeding." *Daviton*, 241 F.3d at 1141. The

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[4] The District Court did not utilize the requirement of same remedies in reaching its decision. In footnote 9 of the Order, the District Court directly addressed the issue of this requirement. Apparently acknowledging the split in the Circuit as to the threshold requirement, the District Court correctly noted that although *Fobbs* imposed a threshold requirement and earlier case law (*Cervantes*) did not, the outcome of the applicability of equitable tolling was the same under either standard.

Daviton Court further explained that "the equitable tolling doctrine requires that the same wrong serve as the predicate for the earlier and later proceedings to make sure defendant received proper notice. In this way, defendant is protected from stale claims. Once notified that a plaintiff seeks a remedy for a certain wrong, defendant can gather evidence, interview witnesses, and locate documents." *Id.*

The *Daviton* Court thus squarely holds that relief for the same wrong is and has always been part of California's equitable tolling doctrine. The Ninth Circuit, however, having interpreted *Daviton* to hold that there is no requirement that the prior and current complaints address the same wrongs, has created an irreconcilable conflict between the decisions of this Court on the proper application of the equitable tolling doctrine.

Because the panel's decision dispensed with a material requirement of law, it applied California's equitable tolling doctrine in a manner that violates basic principles of repose and frustrates federal policies. By its own prior rulings, the Ninth Circuit has acknowledged that the same wrongs requirement is critical to proper notice to defendants. It has explained that "the equitable tolling doctrine requires that the same wrong serve as the predicate for the earlier and later proceedings to make sure defendant received proper notice. In this way, defendant is protected from stale claims." *Daviton*, 241 F.3d at 1141. The Ninth Circuit's ruling eliminates any meaningful notice requirement. *As illustrated below, by failing to require adequate notice, the Ninth Circuit's ruling violates long-established principles of repose and frustrates § 1983 purposes.*

B. Equitable Tolling Should Be Applied Sparingly And Only When There Exists A Complete Identity Between The Two Claims.

This Court has rejected the application of equitable tolling where the claims lack a complete identity. Specifically, this Court has refused to extend the limitations period for a § 1981 claim based on a plaintiff's earlier filing of a Title VII claim. In *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454 (1975), the plaintiff filed a timely charge with the EEOC alleging race discrimination. More than three years later, the EEOC issued a right-to-sue letter. The plaintiff filed suit alleging violations of both Title VII and § 1981. He argued that the one-year limitations period applicable to his § 1981 claim was tolled during the pendency of the processing of his Title VII claim by the EEOC. This Court rejected the plaintiff's arguments and held that the one-year limitations period on his § 1981 claim had expired. This Court held, "plaintiff has slept on his § 1981 rights. The fact that his slumber may have been induced by faith in the adequacy of his Title VII remedy is of little relevance inasmuch as ***the two remedies are truly independent***. We find no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently." 421 U.S. at 466 (emphasis added).

Of particular importance, this Court held in *Johnson* that equitable tolling should not be applied where there is not a complete identity between the causes of action. *Id.* at 467, fn. 14. This holding was in response to a claim that the timely filing with the EEOC has the effect of placing an employer on notice that a claim of discrimination is being asserted. *Id.* In rejecting this argument, this Court stated, "[o]nly where there is a complete identity of the

causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period." *Id.* (citations omitted).

Workers' compensation claims are limited to actions brought against the employing entity and are part of a no-fault strict liability system. Therefore, the mere fact that such a claim exists, does not put a non-employer individual on notice of the need to begin preparing for a defense of all other conceivable causes of action, especially constitutional claims aimed at him or *personally*. In contrast, § 1983 claims are based on principles of individual liability. With such divergent purposes and policies, there is a complete lack of identity between the claims rendering it impossible for courts to properly assess the influence of the policy of repose inherent in the statute of limitations. Moreover, given the fundamental differences between workers' compensation claims and § 1983 claims, it is inconceivable that the drafters of § 1983 anticipated that workers' compensation claims would toll the statute of limitations for § 1983 claims.

Even where two claims have sufficient identity, this Court has held that equitable tolling should be applied sparingly. In fact, equitable relief from statutes of limitations is rare. *National Railroad v. Morgan*, 122 S.Ct. 2061, 2072 (2002) ("Courts may evaluate whether it would be proper to apply such doctrines, although they are to be applied sparingly."); *Rotella v. Wood*, 528 U.S. 549, 561 (2000) ("[t]he virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule"); *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("[f]ederal courts have extended equitable relief only sparingly"); *Baldwin County Welcome Center v.*

Brown, 466 U.S. 147 (1984). Equitable tolling rules cannot be used by a plaintiff who knowingly fails to file within the limitations period. *See Irwin*, 498 U.S. at 458 ("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); *Baldwin County Welcome Center*, 466 U.S. at 152 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."); *Amini v. Oberlin College*, 2001 WL 867422, at 5-7 ("equitable tolling relief should be granted only sparingly," and plaintiff who could have filed earlier but did not was "far from diligent").

In *Baldwin County Welcome Center*, the plaintiff received a right-to-sue notice from the EEOC and mailed the notice to the district court along with a request for appointment of counsel. 466 U.S. at 148. The district court received the right-to-sue notice within 90 days after the plaintiff had received it from the EEOC. *Ibid.* The district court, nevertheless, dismissed the case because the right-to-sue notice did not meet the requirements for a complaint under Rule 8, including a factual statement to support the discrimination claim. *Id.* at 149. The court of appeals reversed, citing the remedial purposes of Title VII, and held that the filing of the right-to-sue notice tolled the running of the limitations period. This Court in turn reversed, agreeing with the district court that the right-to-sue notice did not constitute an adequate complaint. It also rejected the application of equitable tolling premised on the plaintiff's "diligent efforts." *Ibid.* "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Id.* at 152. The Court listed cases in which equitable tolling might be appropriate, including those in which the plaintiff received inadequate notice;

there is a motion for appointment of counsel pending; the court led the plaintiff to believe that she had done everything required of her; or there was affirmative misconduct by the defendant that lulled the plaintiff into inaction. *Id.* at 151-152. The Court noted that none of those factors justifying application of equitable tolling was present, and rejected plaintiff's argument that the lack of prejudice to the defendant should be a factor justifying equitable tolling of Section 706(e)'s limitations period. *Id.* at 152. Likewise, none of the necessary elements for equitable tolling are present in this case. Moreover, Rigg's "hope" that his delay in filing his § 1983 claim would make the retaliation stop does not constitute "diligent efforts" as defined by this Court.

Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As this Court stated in *Mohasco Corp. v. Silver*, 477 U.S. 807, 826 (1980), "[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

Likewise, in *Irwin*, the Court rejected a plaintiff's attempt to rely on equitable tolling to extend the 30-day period in which he was required to file suit after receiving his right-to-sue letter from the EEOC. *Irwin*, 498 U.S. at 96. The plaintiff argued that his attorney was absent from the office when his right-to-sue letter was delivered, and he had filed suit within 30 days of actually receiving the letter. The Court observed that equitable tolling is appropriate in cases where the plaintiff actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the plaintiff had been induced

or tricked by his adversary's misconduct into allowing the filing deadline to pass. *Ibid.* The Court characterized the delay in *Irwin*, by contrast, as "garden variety excusable neglect" and found no extraordinary or exceptional circumstances warranting equitable tolling. *Ibid.*

The sparing use of equitable tolling doctrines also applies to Title VII claims. This Court repeatedly has recognized that limitations periods facilitate the delicate balance among the interests of the employee in protecting his civil rights; the societal interest in promoting prompt filing of discrimination claims, thereby enhancing the likelihood of accurate determinations; and the employer's interest in being protected from untimely claims. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) (limitations periods are "intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights"). *Delaware State College v. Ricks*, 449 U.S. 250, 259-260 (1980) ("it should not be forgotten that time-limitations provisions themselves promote important interests; 'the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones'") (citation omitted); *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977) (employer is "entitled to treat that past [discriminatory] act as lawful after [the employee] failed to file a charge of discrimination" within the limitations period); *International Union of Electrical Radio and Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) ("[a]dherence to the limitations period assures prompt notification to the employer of a charge of an alleged violation of Title VII").

In contravention to this Court's holdings, the Ninth Circuit in this case has eliminated any requirement of

legal similarity. A workers' compensation claim and a federal constitutional claim are insufficiently analogous to support equitable tolling. California has a no-fault workers' compensation system. The type of facts necessary for an individual to gather to defend against a constitutional claim differ drastically from those facts necessary for an entity to process a workers' compensation claim. Therefore, not only do Rigg's claims lack a complete identity, as required by *Johnson*, they lack any identity. Under these circumstances, the Ninth Circuit's application of equitable tolling to this case is, therefore, anything but "sparing."

C. The Decision Below Violates Supreme Court Maxims of Repose.

Where two causes of action lack a complete identity, courts are unable to assess whether the policy of repose inherent in a limitation period has been violated. This Court has consistently held that principles of repose are essential to our system of law. In fact, these policies of repose were the justification for the borrowing of statutes of limitations for § 1983 claims. "A federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our law.' Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Wilson v. Garcia*, 471 U.S. at 271, citations omitted. Therefore, where the application of equitable tolling frustrates a court's ability to evaluate policies of repose, uniformity and similarity, the purposes of § 1983 as articulated in *Wilson* are frustrated.

As illustrated above, the Ninth Circuit eviscerated the need for identity of wrongs, thereby nullifying one of the

basic tenets of repose, namely that defendants have notice of claims to ensure timely preparation of their defenses before evidence disappears and memories fade. As this Court has noted with respect to the statute of limitations, "It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security from stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of the witnesses." *Bell v. Morrison*, 26 U.S. 351, 360 (Mem) (1828). The Ninth Circuit's expansion of equitable tolling has effectively eliminated the protections afforded to litigants by the statute of limitations in contravention of long-standing Supreme Court maxims of repose.

Lastly, the Ninth Circuit eliminated the requirement that each claim must involve the same defendant, thereby further violating established maxims of repose.[5] "To be sure, Smith was not the named employer on the workers compensation claim ... but the record indicates that Smith knew what was going on." This Court has never held that equitable tolling applies where each action

[5] The Ninth Circuit relied on *Collier v. City of Pasadena*, 142 Cal. App. 3d 917 (1983) to hold that Petitioner had received proper notice of the potential § 1983 action because of Rigg's workers' compensation claim. Ironically, it is *Collier* that properly held that the general rule is that equitable tolling applies only where both claims involve the same defendant. In so holding, the *Collier* court stated, "[A]s an example, a workers' compensation claim equitably tolls a personal injury action against that same employer for injuries sustained in the same incident. But under ordinary circumstances that workers' compensation claim would not equitably toll a personal injury action against a third party who might also be liable for the injury." *Id.* at 925.

names different defendants and the party not sued merely may have "known what was going on." This standard is preposterous and disrespectful of this Court's maxims of repose.

D. The Application Of Equitable Tolling Creates Uncertainty And A Lack of Statewide Uniformity In Contravention Of the Purposes Of 42 U.S.C. § 1983 Resulting In Absurd And Unpredictable Litigation Practices.

The Ninth Circuit's application of equitable tolling to California's statute of limitations in this case frustrates the goals of § 1983. In *Wilson*, this Court held that "certainty" and "uniformity" are central to the purposes of § 1983. (*Wilson v. Garcia*, 471 U.S. at 272-276.) In *Wilson*, this Court determined that selecting the appropriate statute of limitations on a case-by-case basis created uncertainty and a lack of uniformity that was foreign to the central purposes of § 1983. In light of this finding, this Court ruled that a single uniform statute corresponding to each state's personal injury statutes must be applied in § 1983 actions. This policy meets the dual purpose of maximizing certainty and creating uniformity.

Equitable tolling and statute of limitations are interrelated concepts and may be applied in § 1983 actions except when inconsistent with federal policy underlying the cause of action under consideration. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980).[6] The application of

[6] In *Tomanio*, this Court determined that the New York rule of tolling was not inconsistent with federal law. The tolling provision in that case provided that "An action . . . must be commenced within the

(Continued on following page)

equitable tolling effectively modifies the impact of the corresponding statute of limitations. If principles of equitable tolling are applied in a manner that protects the fundamental purposes of the statute of limitations, such as notice and similarity, the purposes of § 1983 will not be offended. However, where principles of equitable tolling do not comport with basic maxims of repose, notice and similarity, the § 1983 purposes of uniformity and certainty are sacrificed in contravention to the holding in *Wilson*.

This long established principle was overlooked by the Ninth Circuit, thereby creating uncertainty for litigants in contravention to the purposes of § 1983 as set forth in *Wilson v. Garcia*, 471 U.S. 261. If allowed to stand, the Ninth Circuit's ruling effectively eviscerates the substance of the purpose of the statute of limitations and creates vast and impermissible uncertainty in the context of § 1983 claims. With the removal of the "same wrongs" requirement, there can be no effective notice. Without effective notice, a defendant cannot effectively prepare for its defense in a timely manner.

Worse yet, application of the Ninth Circuit's holding would lead to absurd and unpredictable litigation tactics. Without the need for the claims to involve the same wrong or even the same defendant, it is easy to imagine the panoply of deceptive litigation practices that are likely to follow. As in this case, a plaintiff with any sort of potential

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time specified in this article. . . . No court shall extend the time limited by law for the commencement of an action." *Id.* at 486. Unlike California's common law equitable tolling, New York did not toll the time for filing a cause of action during which a litigant pursues an unrelated cause of action.

§ 1983 cause of action based on work-related facts could choose to file a no-fault workers' compensation claim having no relation to federal principles. Such delays may take several years. At the conclusion of the claim, that same plaintiff could file a § 1983 cause of action based on the overlapping litigated against a *different* defendant. Such absurd litigation tactics could hardly have been the intent of Congress when enacting the § 1983 legislation.

III.
The Ninth Circuit's Holding Imposes Liability Via Respondeat Superior

The Ninth Circuit has ruled that Warden Smith can be held liable for the actions of his subordinates even though it is undisputed that there is no evidence that he was involved in, aware of, or ratified the decisions or actions of his subordinates. Despite the lack of any nexus between the allegations made by Rigg and Petitioner's conduct, the Ninth Circuit has ruled that four allegations be allowed to go forward. The four allegations are: 1) Rigg alleges that in August of 1994, he was threatened with termination by associate wardens for going outside the chain of command, 2) Rigg alleges that on October 8, 1994, he was transferred to a different position by Petitioner, 3) Rigg alleges that on October 31, 1994, Petitioner spoke to the prison employees and criticized whistleblowers, and 4) Rigg alleges that Petitioner prevented him from receiving training in 1995.

With respect to the most serious allegation (threats of termination), the alleged threats occurred approximately two months before Rigg spoke with the FBI and did not involve Smith at all! Therefore, the Ninth Circuit's ruling violates the long standing position of this Court that

individual liability in § 1983 claims cannot be established through respondeat superior. *Farmer v. Brennan*, 511 U.S. 825 (1994).

In *Farmer*, this Court modified the "deliberate indifference" standard in the context of individual liability. *Farmer* involved allegations against individual government officials for violations of the Eighth Amendment. Recognizing the distinction between allegations against a governmental entity as opposed to individual government officials, this Court rejected the "obviousness" test and instead held that individuals are liable only where they act or fail to act despite actual knowledge of a substantial risk of serious harm.

In allowing the four allegations to go forward the Ninth Circuit held that "[w]hile Smith was culpable directly for only some of these acts of retaliation, a reasonable jury could find that Smith was 'aware of specific risk of harm' to Rigg, and did nothing to prevent it from happening under his watch by those under his command. In other words, a jury could find that Smith in his individual capacity 'set in motion a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional injury.'" App. 8, citing *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991).

Larez is inapposite to the facts of this case. Unlike *Larez*, there is no evidence that the associate wardens in this case were implementing a known department policy or a directive from the Warden. With respect to the threats of termination, the allegation fails on two grounds. First, the alleged threats occurred prior to Rigg's protected activity. Second, the threats were isolated incidents made

by associate wardens, and there is no evidence that such threats were made at Petitioner's direction, with his knowledge or pursuant to any Department policy.[7] Therefore, three of the four allegations allowed by the Ninth Circuit are actionable only via respondeat superior in contravention of this Court's established precedent.

IV.
Words Alone, Unaccompanied By Adverse Consequences, Are Not Actionable Under § 1983

Lastly, Petitioner's speech to prison guards about his dissatisfaction with whistleblowers cannot be construed as an adverse action. This Court has never held that words alone, no matter how harsh, constitute an adverse action under § 1983. In fact, the Ninth Circuit's ruling would greatly expand its own definition of adverse action. Such a ruling, if allowed to stand, undermines the very Constitutional rights protected by § 1983. *Nunez v. City of Los Angeles*, 147 F.3d 867, 874-875 (9th Cir. 1998) ("It would be the height of irony, indeed, if mere speech, in response to speech, could constitute a First Amendment violation."). Moreover, the Ninth Circuit's ruling conflicts with this Court's ruling in *Paul v. Davis*, 424 U.S. 693, 701 (1976) ("[D]amage to reputation is not actionable under § 1983 unless it is accompanied by 'some more tangible interests.'") Therefore, Petitioner's speech cannot constitute an adverse action.

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[7] With respect to Rigg's allegation that Petitioner denied his requests for training, there is absolutely no evidence that Petitioner was responsible for the denial of Rigg's requests.

CONCLUSION

Petitioner respectfully submits that equitable tolling principles applied in § 1983 actions against individual defendants must comport with fundamental policies recognized by this Court. If a fundamental purpose of applying state statute of limitations to § 1983 claims is to ensure certainty and repose as indicated in *Wilson*, the Ninth Circuit's ruling cannot stand. By eliminating the need for the "same wrongs" and the same defendants, the Ninth Circuit's decision has expanded the principles of equitable tolling beyond the limits set by this Court, leaving litigants to face uncertain and potentially unscrupulous litigation practices contrary to the purposes of § 1983.

Furthermore, the decision of the Ninth Circuit also imposes liability via respondeat superior in contravention of this Court's rulings. The mere fact that alleged retaliatory acts are committed by Petitioner's subordinates cannot be the basis for liability as to Petitioner. The Ninth Circuit's rationale that Petitioner was "aware of a specific risk of harm" to Rigg is unsupported by any evidence linking Petitioner to the retaliatory acts of his subordinates.

Lastly, by allowing Rigg's allegation regarding Petitioner's speech to go forward, the Ninth Circuit's decision undermines the purposes of § 1983. Presumably, Petitioner has the same constitutional rights of free speech as Rigg. This Court has never held that words alone, unaccompanied by adverse consequences, are actionable under § 1983.

Based upon the foregoing arguments and authorities, Petitioner respectfully petitions this Court for a writ of

certiorari to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: August 19, 2002

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM STEVEN RIGG,
Plaintiff-Appellant,

and

JUDITH V. RIGG,
Plaintiff,

v.

STATE OF CALIFORNIA; WILLIAM MERKLE; THOMAS MADDOCK; EDDIE MYERS; JAMES GOMEZ; and GEORGE A. SMITH,
Defendants-Appellees.

No. 00-17371
D.C. No.
CV-97-02084-DFL

MEMORANDUM*

(Filed Mar. 20, 2002)

Appeal from the United States District Court for the Eastern District of California David F. Levi, District Judge, Presiding

Argued and Submitted February 12, 2002
San Francisco, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Before: D.W. NELSON and HAWKINS, Circuit Judges, and FITZGERALD,** District Judge.

The facts are well-known to the parties and will be repeated only so far as necessary to explain our decision. William Steven Rigg ("Rigg"), a former California corrections officer, filed suit in November 1997 and the bulk of his claims occurred before November 1996. As a general matter, Rigg's 42 U.S.C. § 1983 claims against (now-retired) Warden George A. Smith ("Smith" or "Warden Smith") would be time-barred by the one year limitations period for claims arising in California. *See De Anza Properties X. Ltd. v. County of Santa Cruz,* 936 F.2d 1084, 1085 (9th Cir. 1991). It is Rigg's burden to establish that an exception applies to the limitations period.

As to Rigg's claims against Warden Smith, and only Warden Smith, Rigg has established an exception under the doctrine of equitable tolling. Rigg's first workers compensation claim, filed on October 21, 1994, allows the statute of limitations to toll on his § 1983 claims. Under California law, tolling is permitted if Rigg had several legal remedies and reasonably and in good faith chose not to pursue all of them simultaneously. However, he must also show that there was "'timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.' *Addison v. State of California,* 21 Cal.3d 313, 319, 146 Cal.Rptr. 224, 578 P.2d 941 (1978)." *Daviton v. Columbia/HCA Healthcare Corporation,* 241 F.3d 1131, 1133 (9th Cir. 2001) (en banc).

** Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

Rigg did present the district court with evidence that Warden Smith had timely notice from the filing of the first claim.[1] As a preliminary matter, the first workers compensation claim filed by Rigg indicates that the stress injuries he was experiencing were a result, at least in part, of the punitive job reassignment, which Smith admits to ordering. To be sure, Smith was not the named employer on the workers compensation claim – that was the California Department of Corrections – but the record indicates that Smith knew what was going on. Rigg had complained to Warden Smith about Smith's own acts and those under Smith's supervision.[2] Moreover, Smith received a Memo from Claudia Elliot, his Return to Work Coordinator, which ties the workers compensation claims directly to Rigg's whistleblowing. This memo shows that: (1) Smith was clearly made aware of Rigg's "stress"-related workers compensation claim; and (2) the memo is not just a status report on the progress of Rigg's claim, but alerts Smith that Rigg's deposition was interrupted and then postponed because of Rigg's conversations with the U.S. Attorney's Office. Under these specific circumstances, and in the

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[1] On October 21, 1994, Rigg filed a workers compensation claim for stress-related injury. In his workers compensation claim, Rigg alleged that he was being subjected to "on going [sic] harrasment [sic]," and was "Being threatened with termination, demotion, adverse action, punitive job change because of refusal to violate state law or departmental policy." On December 15, 1994, Rigg filed a second workers compensation claim, alleging that stress was causing him high blood pressure, and a third stress-related workers compensation claim was filed on March 6, 1995, not long after Rigg's truck was vandalized while parked at Pleasant Valley Prison.

[2] For example, in his workers compensation interview, Rigg had complained that as of February 1995 he was still waiting for Smith to honor his request to be transferred from Corcoran State Prison.

context of the imbroglio developing under Smith's watch at Corcoran State Prison, we think it reasonable to conclude that Warden Smith had notice of the first claim, and that "the filing of the first claim" would "alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim." *Collier v. City of Pasadena,* 142 Cal.App.3d 917, 924 (1983).

The notice inquiry typically depends upon the extent of the similarity between the first and second claims.[3] The federal cause of action invoked here is based upon many of the same facts that led Rigg to allege that he suffered stress due to harassment and threats of "termination, demotion, adverse action, punitive job change because of refusal to violate state law or departmental policy." While it is true that Rigg claimed that his stress injuries began before the retaliatory actions of Smith and others, this would not necessarily contradict a finding that his stress injuries or high blood pressure were exacerbated by Smith's retaliatory actions.

The second prong of analysis under California law concerns whether there was any prejudice to the defendant.

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[3] At the time of its decision, the district court did not have the benefit of *Daviton v. Columbia/HCA Healthcare Corporation,* 241 F.3d 1131 (9th Cir. 2001) (en banc), which overruled *Fobbs v. Holy Cross Health System Corporation,* 29 F.3d 1439, 1445 (9th Cir. 1994) to the extent that it conflicted with *Cervantes v. City of San Diego,* 5 F.3d 1273, 1275 (9th Cir. 1993), on the issue of whether a threshold requirement that the prior and current complaints address the same wrongs and grant the same remedies before the three part test of California law applies. The law of this Circuit is that no such threshold inquiry is required before applying the three-part test. *See Daviton,* 241 F.3d at 1133.

Smith merely asserts that "he was obviously prejudiced in his ability to defend himself in this lawsuit" simply because he was retired after July, 1996. A mere assertion of prejudice will not do; although he is retired, Smith has not indicated any difficulty he would have in gathering evidence or locating witnesses. In the absence of proof to the contrary, we find no prejudice to Smith if this suit were to proceed.

The third factor of our analysis weighs heavily in Rigg's favor. In short, we find that Rigg acted in good faith and was not unreasonable in filing the second claim when he did. The district court correctly observed that there is no exhaustion requirement in § 1983 suits, and therefore Rigg wasn't required to delay filing his federal claims. However, Rigg was embroiled in a very delicate situation, rife with hostility, antagonism and resentment for his whistleblowing. Rigg also explained his delay: he had hoped that transfer to another prison, rather than a lawsuit, would make the retaliation and harassment stop. Under these circumstances, Rigg might have reasonably concluded that forcing a lawsuit immediately might make things worse in the prisons, not only for the officers and those guards trying to meliorate conditions, but perhaps also for the inmates. Under these difficult circumstances, Rigg's actions should not be deemed unreasonable or lacking in good faith.

Because we find equitable tolling applies to Rigg's claims against Warden Smith, we must now examine whether Smith would be entitled to qualified immunity for some of his actions. The appropriate test for determining whether Smith should receive qualified immunity is based on the outcome of the balancing formula outlined in *Pickering v. Board of Education,* 391 U.S. 563 (1968). Rigg

must show that his speech involved a matter of public concern and that the interests served by allowing Rigg to express himself outweighed the state's interests in promoting workplace efficiency and avoiding workplace disruption. In answering that question, we are mindful that the qualified immunity analysis should not occur in a vacuum, processing facts wrenched from their proper context. *Saucier v. Katz,* 121 S. Ct. 2151, 2156 (2001).

There can be no reasonable dispute over whether Rigg's concerns over the improper shooting policy specifically and inmate treatment generally at Corcoran can survive the first threshold. They do. Further, the second prong is also satisfied by Rigg because of this Circuit's long line of cases indicating that "the public's interest in learning about illegal conduct by public officials and other matters at the core of First Amendment protection outweighs a state employer's interest in avoiding a mere *potential* disturbance to the workplace." *Keyser v. Sacramento City Unified School District,* 265 F.3d 741, 748 (9th Cir. 2001) (emphasis in original) (citing cases). Whistleblowing "by its very nature . . . engender[s] some hostility and resistance," *see id.,* but that is no reason to not support the "free speech interests at the core of speech on matters of public concern." *Id.* A government supervisor, we have held, "does not have a legitimate interest in covering up mismanagement or corruption and cannot justify retaliation against whistleblowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure." *Id.*

Because Rigg has shown that Smith's conduct violated a constitutional right, and because such a right was clearly established – that is, a reasonable official would know his conduct was unlawful in the situation he confronted – Smith

lacks qualified immunity for the claim concerning allegedly retaliatory actions taken against Rigg.

Moving beyond qualified immunity, we consider whether it was appropriate to grant summary judgment to Smith on other grounds. To prevail, Rigg must show that he engaged in constitutionally protected conduct that was a substantial or motivating factor in the adverse action. Then, if Rigg is able to survive that burden, the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct. *Keyser,* 265 F.3d at 750. Moreover, it is Rigg's responsibility to show that the retaliation he suffered, taken as a whole, was adverse. *Blair v. City of Pomona,* 223 F.3d 1074, 1079 (9th Cir. 2000).

The district court, rather than addressing the allegations as a whole, as *Blair* indicates, dissected each discrete event, concluding that, with one exception, each act was either not adverse, not connected to Smith or not motivated by Smith's retaliatory intent. But Rigg alleges he was threatened with termination by associate wardens under Smith's supervision, that he was transferred to a less desirable job at Smith's behest,[4] that he was endangered

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[4] On October 8, 1994, Steve Rigg was reassigned, on the order of Warden Smith, to a position as a 3-A relief lieutenant. Warden Smith admitted he reassigned Rigg because Rigg was "stealing documents from my prison." Although the reassignment did not affect Rigg's pay or benefits, Rigg viewed it as punitive, a viewpoint validated in part by Smith's admission that he ordered the reassignment because Rigg was "stealing documents." The documents Rigg was "stealing," however, were evidence of a shooting of an inmate in violation of California Department of Corrections' policy. Rigg wanted evidence preserved for the FBI investigation of misconduct at Corcoran State Prison.

by Smith's vilification of whistleblowers in front of the prison guards (especially because it was predictable that Rigg would become known as the whistleblower); and that he was prevented by Smith's deputies and associates from receiving training.[5] While Smith was culpable directly for only some of these acts of retaliation, a reasonable jury could find that Smith was "aware of a specific risk of harm" to Rigg, and did nothing to prevent it from happening under his watch by those under his command. In other words, a jury could find that Smith in his individual capacity "set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional injury." *Larez v. City of Los Angeles,* 946 F.2d 630, 646 (9th Cir. 1991) (internal quotations, citations and brackets omitted). *See also Blair,* 223 F.3d at 1079 (summary judgment inappropriate because plaintiff "was subjected to a series of acts that a reasonable factfinder could infer were inflicted by members of the Department with the knowledge and tacit connivance of those running the Department").

Smith's acts and omissions could be viewed by a rational fact finder as motivated by retaliatory intent. Smith's statements about whistleblowers during the October 31, 1994, meeting might, to a reasonable jury, indicate hostile intent, especially in light of Smith having acknowledged transferring Rigg to a less desirable job.

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[5] Excepting these specific allegations by Rigg against Smith, we agree with the district court's analysis of Rigg's other allegations, and that those ones should not proceed beyond summary judgment.

Conclusion

The district court acknowledged that, absent statute of limitations concerns, the claim surrounding Rigg's reassignment by Smith to a different job in October, 1994 should go forward. Having removed the time bar, we agree. But we further hold that three other allegations surrounding Smith's actual involvement in, or deliberate indifference to, the pattern of retaliatory behavior against Rigg should go forward, in part because Smith did not have qualified immunity for the pattern of retaliatory actions alleged as a whole, and that absent qualified immunity, summary judgment for Smith was inappropriate.[6] With respect to Rigg's claims against Warden Smith, we therefore affirm in part, reverse and remand in part for proceedings consistent with this memorandum disposition. With respect to Rigg's claims against all other defendants, the judgment of the district court is affirmed.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART. Each party to bear its own costs on appeal.

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[6] To reiterate: The three additional allegations to go forward are the threat of termination for going outside the chain of command; the prevention by Smith of Rigg to receive training at Galt; and Smith's statements against whistleblowers in October, 1994. The ones that will not go forward are: the claim that Smith prevented Rigg from training officers on the shooting policy at Corcoran; the claim that Chavez gave Rigg a punitive job change on the order of Smith; and the claim that Smith blocked Rigg's request to transfer to Pleasant Valley Prison.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM STEVEN RIGG, Plaintiff-Appellant, and JUDITH V. RIGG, Plaintiff, v. STATE OF CALIFORNIA, WILLIAM MERKLE; THOMAS MADDOCK; EDDIE MYERS; JAMES GOMEZ; and GEORGE A. SMITH, Defendants-Appellees.	No. 00-17371 D.C. No. CV-97-02084-DFL Eastern District of California Sacramento ORDER (Filed July 01, 2002)

Before: HAWKINS, Circuit Judge.

Defendant-Appellee George A. Smith's Motion Requesting Stay of Mandate Pending Petition to the United States Supreme Court for a Writ of Certiorari is GRANTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM STEVEN RIGG, and JUDITH V. RIGG,

Plaintiffs,

v.

STATE OF CALIFORNIA, WILLIAM MERKLE, THOMAS MADDOCK, EDDIE MYERS, JAMES GOMEZ, GEORGE A. SMITH, and DOES 1 through 25,

Defendants.

CIV-S-97-2084 DFL JFM

MEMORANDUM OF OPINION AND ORDER

(Filed Sept. 29, 2000)

This is a First Amendment retaliation action brought under 42 U.S.C. § 1983. Plaintiffs Lieutenant William Steven Rigg ("Rigg" or "Steve Rigg") and Correctional Officer Judith V. Rigg ("Judy Rigg," collectively "the Riggs") are former employees of the California Department of Corrections ("CDC"). Steve Rigg claims that he was retaliated against by the defendants, the State of California and high ranking officials within the CDC, for exercising his First Amendment right to speech. Judy Rigg claims that she was retaliated against by the defendants for her association with Steve Rigg, her husband.

The substance of the Riggs' claims is that Steve Rigg's vocal opposition to the policies at Corcoran State Prison ("Corcoran"), beginning with his first complaint to the CDC to his subsequent cooperation with the

Federal Bureau of Investigation ("FBI"), created a cascade of reprisals that were either initiated or condoned by the defendants. However, in order for the plaintiffs' claims to proceed, there must be a nexus between the alleged retaliation and the individual defendants being sued.

All the individual defendants held supervisory positions in the CDC, although none of the defendants directly supervised either of the plaintiffs. Instead, there were at least two or three levels of supervision between the plaintiffs and each of the defendants. William Merkle was the Warden at High Desert State Prison from September 1994 to December 30, 1996. Thomas Maddock was the Interim Director of the CDC from January 21, 1997 to mid-August 1997. Eddie Myers was the Regional Director for the Central Region of the CDC starting in October 1993. From July 1995 until December 30, 1997, Myers was the Chief Deputy Director for the CDC. James Gomez was the Director of the CDC from April 15, 1991 to January 16, 1997. George Smith was the Warden at Corcoran State Prison from January 1993 to July 31, 1996.

The defendants now move for summary judgment on all of the plaintiffs' claims. For the reasons stated below, this motion will be granted.

I.

In 1988, the Riggs transferred to Corcoran State Prison ("Corcoran") as correctional officers. They were married the following year. In 1992, Steve Rigg was promoted to Lieutenant and became the Program Lieutenant and Watch Commander. He was also a firearms

instructor. In 1994, Corcoran was rocked by allegations of misconduct brought by prisoners and correctional officers, including Steve Rigg. According to the allegations, correctional officers at Corcoran were pitting rival inmates against one another in hand-to-hand combat and using deadly force against inmates unnecessarily. Rigg was particularly concerned about Corcoran's shooting policy.

In the early summer of 1994, Rigg asserts that Associate Warden Farris told him to ignore a CDC memorandum from CDC Deputy Director David Tristan on the use of the .37 millimeter gas gun. As a result, in July 1994, Rigg complained to CDC headquarters in Sacramento that the CDC's shooting policy was being ignored at Corcoran. At CDC headquarters, Rigg talked to Lieutenant Mike Evans, who relayed Rigg's concerns to defendant Eddie Myers, the Regional Director for the Central Region of the CDC, which included Corcoran. Myers, in turn, discussed the issue with George Smith, Corcoran's warden.

In August 1994, as a result of his complaint, Rigg alleges that he was questioned by Corcoran Associate Wardens Bruce Farris and Marvin Meske. Rigg claims that at this meeting he was threatened with termination for going to headquarters, outside of the chain of command. (S. Rigg Decl. ¶ 7.) Rigg provides no evidence that the meeting or the alleged threats were authorized by Smith or any other defendant.

A month later Steve Rigg and Officer Richard Caruso, another whistleblower, met to discuss the death of inmate Preston Tate, who had been killed in a shooting by a correctional officer. They decided to contact the

FBI. (*Id.* ¶ 8.) Rigg also directed Caruso to remove documents from the prison for the FBI. (*Id.*)

Because both Steve Rigg and his wife knew that Corcoran's personnel would discover Steve Rigg's cooperation with the FBI, the Riggs hoped that they could transfer out of Corcoran, to positions at another prison. Judy Rigg successfully transferred from Corcoran to Pleasant Valley Prison on October 3, 1994. (J. Rigg Decl. ¶ 4.) Steve Rigg claims that his transfer request to Pleasant Valley Prison was blocked by Warden Smith, but offers no admissible evidence to support this assertion. (S. Rigg Decl. ¶ 26.)

Steve Rigg met with the FBI at his home on September 29, 1994, and again on October 4, 1994. (*Id.* ¶ 10.) On October 8, 1994, Rigg was reassigned from his position as a 4-A/Special Housing Unit Lieutenant to the position of a 3-A Relief Lieutenant. (*Id.* ¶ 14.) Rigg claims that this reassignment was a punitive job change, yet there is no suggestion that the transfer affected tangible benefits such as pay, hours, or promotion potential. (*Id.*) Defendant Smith admits that he ordered the reassignment because Rigg was removing documents. (Pls.' Exh. 9, Smith Dep., *Caruso v. California*, at 143:21-144:10.) Around this time, Rigg also claims that Smith and his subordinates prevented Rigg from receiving training at Galt Academy. (S. Rigg Decl. ¶ 28.) Again, however, Rigg offers no evidence that Smith was responsible for training decisions or this decision in particular, to support his claim that Smith gave these orders.

On October 21, 1994, Rigg filed a workers' compensation claim for stress caused by threats of "termination,

demotion, adverse action, [and a] punitive job change because of [his] refusal to violate state law or departmental policy." (*Id.*, Exh. 1.) Rigg also alleged that Corcoran had knowledge or notice of this injury as of January 1, 1994, even before Rigg had talked to either Lieutenant Evans of the CDC in July or the FBI in September and October. (*Id.)* The implication of this statement is that Rigg claimed that his injury originated prior to his criticism of Corcoran's shooting policy.

On October 28, 1994, the *Hanford Sentinel* reported that an "unidentified prison supervisor" was making allegations of misconduct of Corcoran to the FBI. The next day, on October 29, 1994, the *Fresno Bee* published a similar story. In response to these two articles, Warden Smith called a staff meeting which included approximately 250 correctional officers, including Steve Rigg. Smith was upset that an "anonymous" source in the two articles specifically identified Corcoran officials as being investigated for wrongdoing, and he wanted to boost the morale in the prison. (Pls.' Exh. 9, Smith Dep., *Caruso v. California*, at 63:25-64:20.) At the meeting, Smith stated that he was "'mad as hell,' that people would do something like this to their fellow staff members to jeopardize their lives and not have – have enough intestinal fortitude to give their names and hide behind anonymity," and that the unidentified sources were like "kids throwing rocks while hiding behind their mother's skirts." (*Id.* at 67:12-16, 69:20-24.) When Smith made these comments, he believed that Rigg was one of the unidentified sources, (*id.* at 65:11-15), but "never mentioned anybody by name" at the meeting. (*Id.* at 67:16-17.)

Following this incident, Rigg filed an employee grievance on November 8, 1994. In this grievance, Rigg complained of Smith's conduct at the October 31, 1994 meeting. Rigg wrote: "I viewed several of [Smith's] comments as a solicitation of retaliation of vandalism and personal injury either on or off duty." (Pls.' Exh. 18.) Rigg requested 24 hour protection at the expense of the CDC for himself and his family. He also asked for reassignment to a position where his regular days off would be Sunday and Monday again, as they were prior to his transfer to the Relief Lieutenant position. (*Id.*) Smith issued a second level response to Rigg's November 8, 1994 grievance on December 1, 1994, denying that his comments on October 31, 1994 were intended to incite retaliation against Rigg. (Pls.' Exh. 19.) Ultimately, Rigg's grievance was denied.

On November 10, 1994, Rigg testified before a federal grand jury regarding alleged civil rights violations at Corcoran. (S. Rigg Decl. ¶ 20.) On November 22, 1994, Smith told Corcoran Captains John Cobb and Steve Fletcher to meet with Rigg because, according to Smith, he believed that Rigg was improperly training officers with respect to Corcoran's firing policy. (Pls.' Exh. 9, Smith Dep., *Caruso v. California*, at 139:22-140:10.) Cobb and Fletcher directed Rigg to neither do any investigations nor provide the FBI with any additional information or documents. (S. Rigg Decl. ¶ 21; Thorne Decl., Exh. A, Trans. of Nov. 22, 1994 Interview of S. Rigg by Cobb and Fletcher.) Rigg's characterization that Cobb and Fletcher told him to "knock it off" is not reflected in the transcript of the interview. Cobb and Fletcher ordered Rigg to only teach the range classes in accordance with Corcoran's firing policy, but at that

time Rigg had already told the range master that he was not teaching any more classes until the policy was changed. (*Id.*)

On December 15, 1994, Rigg filed a second workers' compensation claim, alleging that stress was causing him to suffer from high blood pressure. (Pls.' Exh. 3.) In late 1994 or early 1995, the Riggs' truck was vandalized while parked at Pleasant Valley Prison. (J. Rigg Decl. ¶ 5.) Rigg filed a third workers' compensation claim on March 6, 1995, also alleging stress. (Pls.' Exh. 6.)

In April 1995, Smith approved Rigg's transfer request to High Desert State Prison, a newly staffed institution within the CDC. (Smith Decl. Exhs. A & B.) Although Rigg's transfer had been approved, on May 22, 1995, Rigg sent a letter to Smith requesting that he be reinstated to Corcoran's range team and be allowed to participate in formal training at Galt Academy. (Pls.' Exh. 20.) Rigg complains that he never received a response to this request. On August 2, 1995, Rigg began working at High Desert State Prison.

Despite the transfer, Rigg alleges continued retaliation at High Desert both because of his activity at Corcoran and because of his continuing participation in the investigation publicity surrounding Corcoran.[1] Rigg claims that prior to his transfer he was told that he would be designated as an assignment lieutenant at High Desert. (S. Rigg Decl. ¶ 30.) In fact, he was given a relief lieutenant position, which, Rigg claims, was not

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[1] On December 1, 1995, Rigg appeared anonymously on CNN.

commensurate with his experience. According to Rigg, other lieutenants with less seniority were given more desirable positions. (*Id.* ¶¶ 30-33.)[2]

Rigg received a transfer from the relief lieutenant position on April 1, 1996 to the Administrative Segregation Unit, a transfer which Rigg welcomed. However, on June 10, 1996, he was transferred back to the position of relief lieutenant. Rigg's supervisor at the Administration Segregation Unit, Associate Warden Priscilla Chavez, claims that she requested that Rigg be reassigned to relief lieutenant only after she was informed that Rigg had requested to use oleoresin capsicum gas on an inmate who was already under staff control in double restraints. (Chavez Decl. ¶ 3.) Rigg alleges that Chavez falsely accused him because she was one of Warden Smith's proteges. (S. Rigg Decl. ¶ 39.)[3] Chavez's request to transfer Rigg was approved by Warden Merkle.

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[2] Around the second week of August 1995, after Rigg had started working at High Desert, Merkle first complained to Associate Warden Raymond Novencido that Novencido had not done his "homework" and had hired a "troublemaker." (Novencido Dep. at 63:16-64:1.) While this comment might be evidence that Merkle disliked Rigg, it does not show that Merkle took steps to retaliate against Rigg. Indeed, as to events occurring prior to this conversation, the comment tends to suggest the opposite: that Merkle did not know that Rigg was a whistleblower at the time Rigg was hired and assigned as a relief lieutenant. (Merkle Dep. at 63:1-13.) However a jury might ultimately weigh the comment, and drawing all possible inferences in favor of plaintiff, the comment on its own does not establish Merkle's involvement or liability but only his dislike of Rigg because of his activities at Corcoran.

[3] Warden Smith retired from the CDC in May 1996.

Rigg also complains that Merkle failed to investigate some documents that severely criticized Rigg, which were faxed on June 4, 1996 to Captain D. Peterson from a fax machine outside the prison by unknown individuals claiming only to be "California Taxpayers." (Pls.' Exh. 29.) Peterson, noting that the documents were sent unsolicited and without his knowledge, gave the documents to Merkle. (*Id.*)

In June 1996, Judy Rigg transferred from Pleasant Valley to High Desert. Once again, both Riggs were working at the same prison. A few weeks later, on August 21, 1996, an article was published in the *Los Angeles Times* which reported Steve Rigg's involvement in uncovering violence at Corcoran.[4]

In February 1996, Rigg allegedly referred to three Correctional Officers as "crooked cops" in front of three inmates, a conduct violation. Warden Merkle assigned Captain Marv Music to investigate. On July 18, 1996, Rigg received a conduct violation for making the "crooked cops" comment. (Pls.' Exh. 28.) According to Music, this violation was given because Rigg admitted to making the comment, and, although he claims that it was not directed at any particular officers, some of inmates who overheard the comment indicated to the contrary. (*Id.*)

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[4] Further, a front page article in the *San Francisco Chronicle* published on October 28, 1996 discussed Steve Rigg's involvement as a whistleblower. On November 9, 1996 an article was published in the *Sacramento Bee* about whistleblowers which included a picture of Steve Rigg. Finally, on November 25, 1996, Steve Rigg was featured in an interview of Eddie Myers on the television program "60 Minutes."

Starting in early November 1996, a series of investigations were conducted by High Desert's administration concerning allegations of retaliation against the Riggs. The Riggs claim that the investigations were destined to fail because Merkle delayed their initiation and assigned them to an inexperienced investigator, Captain Nancy McClure. In none of these investigations was the identity of any retaliator discovered. As a result, no charges or action were brought against any individuals within the prison.

The first investigation was requested when Associate Warden Novencido informed Merkle that an electrician had seen a newspaper photograph of Rigg posted on the wall of a control booth with rat ears and a rat tail drawn on it. Merkle ordered the investigation. No charges could be sustained in the investigation, however, because neither the photograph nor a responsible person was ever found. (Pls.' Exh. 37.) Second, McClure investigated an allegation that someone created an inmate identification card with Rigg's photo pasted on it with the phrase "I be tellin'." Like the other investigation, McClure concluded that no charges could be brought because the identification card was never located. (*Id.*)

Third, Judy Rigg claimed that she was punitively reassigned in December 1996. She claimed that Lieutenant John Vaughn ordered the transfer because he had been involved in some of the incidents at Corcoran, which Steve Rigg disclosed.[5] Upon investigation, McClure

[5] Vaughn had been indicted, and Steve Rigg had testified against him at the grand jury.

discovered, however, that Judy Rigg was reassigned because she did not have the necessary seniority for the position she had been occupying and that Vaughn had not been involved in the decision. (*Id.*; Peddicord Decl. ¶ 7.)

Fourth, Judy Rigg alleged that four or five male officers refused to assist her when she was supervising inmates who were unloading a food truck.[6] (J. Rigg Decl. ¶ 10.) McClure also investigated this allegation but could not take action because Judy Rigg could not identify any of the officers and McClure could not locate the necessary administrative record of Judy Rigg's location for that day.

Fifth, McClure investigated an allegation that an officer said to Judy Rigg, "Why doesn't your old man quit telling on people, he is only going to get himself killed." (Pls.' Exh. 37.) Although this allegation sounds serious, McClure determined that was meritless because both the officer and Judy Rigg denied that the incident had occurred.

Warden Merke retired on December 30, 1996. Due to elevated blood pressure, Steve Rigg went on sick leave on January 14 1997, and he never returned to work. Around the same time, Judy Rigg also went on sick leave.[7] On January 23, 1997, Steve and Judy Rigg

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[6] This incident allegedly occurred on September 21, 1996, but it was not discovered until Judy Rigg was interviewed by McClure about the alleged punitive job transfer. There is no evidence that Corcoran administration knew about the alleged incident prior to that time.

[7] Judy Rigg also filed a workers' compensation claim on December 12, 1996.

sent Thomas Maddock, the Interim Director of the CDC, a letter requesting physical protection and paid administrative leave due to what the Riggs described as ongoing harassment and retaliation. (Pls.' Exh. 41.) Maddock immediately ordered an investigation with respect to the Riggs' physical safety concerns. (Maddock Decl. ¶¶ 15-16.) The investigation concluded that the Riggs were not actually requesting physical protection. (D. Smith Decl. ¶ 6; S. Rigg Dep. at 737:27-739:14.) As a result, on February 12, 1997, Maddock responded to the Riggs' request by stating that the Special Services Unit would investigate their claims of retaliation, and that since they were on sick leave a transfer seemed premature. (Pls.' Exh. 42.)

On June 12, 1997, Steve Rigg applied for disability retirement due to stress and high blood pressure. Judy Rigg applied for disability retirement on August 6, 1997, also based on stress. In August 1997, Steve Rigg retired. On November 4, 1997 the Riggs filed this complaint in federal court. Judy Rigg retired in April 1998. On May 4, 1999, the pending workers' compensation claims filed by the Riggs were resolved.

II. State of California

The State of California correctly argues that the plaintiffs' lawsuit against it is barred by the Eleventh Amendment, and that the State is not a "person" under § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 2308 (1989). Accordingly, the State of California is dismissed.

III. Statute of Limitations

The statute of limitations is a substantial hurdle to the Riggs' claims. Statutes of limitations are not pointless technicalities, they protect significant rights and interests, including the reliability of the court's truth seeking function. "A federal cause of action brought at any distance of time would be utterly repugnant to the genius of our laws. Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Wilson v. Garcia*, 471 U.S. 261, 271, 105 S. Ct. 1938, 1944 (1985) (citing *Adams v. Wood*, 6 U.S. (2 Cran.) 336, 342 (1805) (Mem.)) (internal citation omitted).

The statute of limitations for § 1983 actiosn is one year for claims arising in California. *See De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d, 1084, 1085 (9th Cir. 1991). Since the Riggs filed their complaint in federal court on November 4, 1997, the limitations period extends back to November 4, 1996. As a result, a majority of the Riggs' allegations fall well outside of the limitations period. Once a statute of limitations defense is properly raised by the defendants, it becomes the plaintiffs' burden to establish that an exception applies. *See Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1218 (9th Cir. 1980); *Permanente Medical Group/Kaiser Foundation Hospitals v. Workers' Compensation Appeals Bd.*, 171 Cal.App.3d 1171, 1184, 217 Cal. Rptr. 873, 880 (1985).

The plaintiffs offer three theories in order to reach beyond the limitations period. First, they argue that Steve Rigg's claim against defendant Smith is equitably tolled by Rigg's workers' compensation claim filed on

October 21, 1994.[8] Second, the Riggs argue that all of their claims are timely under a continuing violation theory. Third, the Riggs argue that their claims are timely because they have alleged that the defendants conspired to violate their constitutional rights.

A. Equitable Tolling

The equitable tolling doctrine applies to § 1983 claims arising in California. *See Donoghue v. County of Orange*, 848 F.2d 926, 930 (9th Cir. 1987). California law permits equitable tolling when a plaintiff has "several formal legal remedies and reasonably and in good faith pursues one," *Jones v. Tracy School Dist.*, 27 Cal.3d 99, 108, 165 Cal. Rptr. 100, 104 (1980) (citing *Elkins v. Derby*, 12 Cal.3d 410, 115 Cal. Rptr. 641 (1974)), if three requirements are satisfied.[9] First, the

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[8] At oral argument on May 19, 2000, counsel for the plaintiffs conceded that the equitable tolling doctrine would only save the Riggs' claims against defendant Smith. Since Judy Rigg filed her workers' compensation claim on December 12, 1996 and no allegations against Smith occurred before December 12, 1995, the equitable tolling doctrine does not aid her.

Nonetheless, even if the Riggs were to argue that their workers' compensation claims tolled their claims against the other defendants, such an argument would fail because the relationship between the workers' compensation claims and the other defendants is even more tenuous than the relationship between Rigg's October 21, 1994 workers' compensation claim and defendant Smith.

[9] The Ninth Circuit has held that a plaintiff must first meet a threshold requirement of showing that the prior and current complaints address the same wrongs and grant the same remedies before the three part test applies. *See Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439, 1445 (9th Cir. 1994). Failure to meet this threshold requirement precludes the application of California's three-part test. *See id.* Under

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plaintiff must have provided the defendant with timely notice in the filing of the first claim. Second, there must be sufficient legal and factual similarity between the two claims such the the defendant would not be prejudiced in the second claim. And third, the plaintiff must have acted in good faith and in reasonable conduct in filing the second claim. *See Donoghue*, 848 F.2d at 931; *see also Collier v. City of Pasadena*, 142 Cal.App.3d 917, 924, 191 Cal. Rptr. 681, 685 (1983).

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the reasoning in *Fobbs*, Rigg does not satisfy the threshold requierment because his workers' compensation claim does not "address the same wrongs and grant the same remedies," *id.*, as his § 1983 claim. However, there is also authority within the Ninth Circuit suggesting that there is no such threshold requirement.

> However, "similarity" of the prior and current claims is a matter best determined following, and on the basis of, the application of the three-part equitable tolling test established by California law. Although we have previously stated that "equitable tolling is not applicable when a plaintiff has pursued a remedy as to only one of several wrongs," *Donoghue*, 848 F.2d at 931, we have never suggested that in reaching that determination the district court may bypass the traditional method for determining California equitable tolling issues. It is the application of California's equitable tolling test itself that yields the "final" conclusion as to whether two claims are "similar" enough that the pendency of the one should toll the limitations period for the other. Although "similarity" often serves as a shorthand designation of the outcome of the test, it is neither separable from nor a "threshold" to the requisite three-part inquiry. Application of the three-part test is mandatory.

See Cervantes v. City of San Diego, 5 F.3d 1273, 1275 (9th Cir. 1993). *Fobbs* is the more recent decision within the Circuit, and is binding. Nonetheless, the outcome is the same under either *Fobbs* or *Cervantes*.

Rigg does not satisfy these requirements. As to notice, Rigg fails to come forward with evidence that Smith was aware of Rigg's workers' compensation claim or of any of the supporting letters or other material that were submitted to the State Compensation Insurance Fund and the Auditor's Office. As to similarity, Rigg fails to show that his prior workers' compensation claim and his current § 1983 constitutional claim against Warden Smith are so legally and factually similar that defendant Smith – sued in his individual capacity in the federal claim – would not be prejudiced by the relation back of this lawsuit to Rigg's workers' compensation claim against the CDC. As to reasonableness, Rigg has not demonstrated that he acted reasonably in filing the federal claim against Smith almost two and a half years after Rigg had transferred out of Corcoran where Smith was the Warden.

1. Notice

In *Collier*, the court addressed whether a workers' compensation claim would toll a subsequent disability pension claim arising from the same injury. On the notice requirement, the court explained:

> [T]he filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this means that the defendant in the first claim is the same one being sued in the second. As an example, a workers' compensation claim equitably tolls a personal injury action against that same employer for injuries sustained in the same incident. But under ordinary circumstances that workers' compensation claim would not equitably toll a personal injury action

> against a third party who might also be liable for the injury.

Collier, 142 Cal. App. 3d at 924-25, 191 Cal. Rptr. at 685. Here, Warden Smith is a third party to Rigg's workers' compensation claim against the State of California. Given the scant references to Smith in Rigg's workers' compensation file, it is unlikely that Smith was aware that Rigg's workers' compensation claims presented claims against him. The evidence which Rigg cites only establishes that Smith knew that Rigg had a stress claim, but does not show that Smith saw the claim or believed it was directed against him. (Pls.' Exh. 7, Letter from Elliot to Smith, Aug. 17, 1995.) The claim itself is perfunctory and sketchy.

Moreover, during the State Compensation Insurance Fund's investigation in anticipation of workers' compensation litigation, Rigg focused his allegations against Bruce Farris rather than defendant Smith, and mentioned collateral matters such as promotions based upon ethnic background and allegations of sexual harassment. (Pls.' Exh. 4, Interview of Steve Rigg, Feb. 1, 1995; *Id.* Exh. 7, Letter from Elliott to Smith, Aug. 17, 1995 (noting that Rigg became agitated during his workers' compensation deposition when the questioning focused upon Bruce Farris).) Even assuming that Smith was given the transcript, the deposition did not put Smith on notice that he would someday be sued in his personal capacity.

As Warden, Smith had numerous administrative responsibilities, and Rigg was just one of many lieutenants he supervised. Rigg has failed to provide a sufficient basis for the court to infer that a Warden such as Smith in the ordinary course would be informed of the substance of all workers' compensation claims. However, even if Smith was

put on notice of an ongoing workers' compensation claim, Smith was not placed on notice that Rigg intended to pursue a claim against him and that it was therefore in his interest to make preparations for litigation many years down the road. *See Garabedian v. Skochko*, 232 Cal.App.3d 836, 847, 283 Cal. Rptr. 802, 809 (1991). Smith has been retired for nearly four years, and he will undoubtably be prejudiced if required to recall events that occurred five to six years in the past. As a result, the court concludes that Rigg has not met his burden of establishing that Smith had adequate notice.

2. Similarity

For equitable tolling to apply, the two claims must be factually and legally similar. This "similarity" places the defendant on notice of the need to gather evidence concerning fault. *Elkins v. Derby*, 12 Cal.3d 410, 418, 115 Cal. Rptr. 641, 646 (1974). Personal injury claims and constitutional claims are generally insufficiently analogous to support equitable tolling:

> It has long been established that the Civil Rights Act does not supply a federal remedy for the ordinary tortious acts or omissions of state and local governmental employees. To thus invoke a federal cause of action, the plaintiff must allege facts that go beyond mere tortious conduct, and rise to the dignity of a violation of a federal constitutional or statutory right. Under the circumstances, we think it clear that the type and amount of evidence needed to defend against the instant action is significantly dissimilar to that which would have been needed to oppose the federal litigation.

Loehr v. Ventura County Community College Dist., 147 Cal.App.3d 1071, 1085, 195 Cal. Rptr. 576, 585 (1984) (internal citation omitted).

Moreover, in his October 21, 1994 workers' compensation claim, Rigg alleged that he suffered from stress due to harassment and threats of "termination, demotion, adverse action, punitive job change because of [his] refusal to violate state law or departmental policy." (Scott Decl., Exh. 1.) However, he also claimed that the CDC had knowledge or notice of this injury as of January 1, 1994, months before Rigg had contacted the CDC or the FBI about Corcoran's firing policy and well before he was transferred to relief lieutenant or attended the October 1994 meeting at which Smith denounced anonymous sources. (*Id.*) Similarly, in his workers' compensation deposition, Rigg asserted that this ongoing injury dated back to 1992. (Pls.' Exh. 62, Rigg Workers' Comp. Dep., at 12:2-16.) At the very least, this time differential creates confusion as to whether the workers' compensation claim was filed to address injuries other than those that are the subject of Rigg's § 1983 claim.

3. Good Faith and Reasonable Conduct

California's requirement for "good faith and reasonable conduct" is "used in its plain and ordinary sense." *Ervin v. County of Los Angeles*, 848 F.2d 1018, 1020 (9th Cir. 1988). The plaintiff must demonstrate that the delay in filing the second claim was in good faith and was reasonable. Rigg bears the burden of establishing the exception and the reasonableness of his conduct. *See Permanente Medical Group/Kaiser Foundation Hospitals*, 171 Cal.App.3d at 1184, 217 Cal. Rptr. at 880. Thus, Rigg

must show that he acted in good faith and in reasonable conduct. Rigg does not satisfy this burden.

Three factors work against the plaintiff's assertion that his actions were in good faith and reasonable. First, Rigg has not explained why he delayed filing his federal claims until over three years had lapsed from the filing of his first workers' compensation claim. There is no exhaustion requirement in § 1983. No reason is provided for waiting such a long time after the events in question occurred. Smith retired from the CDC in August 1996. Yet Rigg delayed bringing the lawsuit until after Smith and most of the other individual defendants had retired, at a point in their lives when they would be least able to defend their conduct of many years ago. Smith will be prejudiced by this delay.

Second, in the course of a workers' compensation interview in 1995, Rigg stated that he had already filed a separate lawsuit against the CDC, Corcoran, Bruce Farris, and defendant Smith. (Pls.' Exh. 4, Interview of Steve Rigg, Feb. 1, 1995, at 45.) This statement suggests that Rigg did not possess "several formal legal remedies and *reasonably and in good faith pursue[d] one.*" *Jones*, 27 Cal.3d at 108, 165 Cal. Rptr. at 104 (emphasis added). Rather, Rigg may have pursued multiple remedies in the first instance, or at least announced that he was doing so, and he now desires to either bring new claims or to resurrect old ones, after the statute of limitations has lapsed.[10] Even if Rigg was not in fact pursuing litigation, his statement would

[10] Rigg has the burden on tolling but he has not explained his statement that he had filed a separate lawsuit.

suggest to any potential defendant that Rigg had made his litigation choices and was not deferring litigation until resolution of the workers' compensation claims. In these circumstances, Rigg's conduct cannot be viewed as reasonable. *See Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 985 (9th Cir. 1997); *Ervin*, 848 F.2d at 1020; *see also Fink v. Shedler*, 192 F.3d 911, 916-17 (9th Cir. 1999).

B. Continuing Violation Theory

The Riggs argue that all of their claims are timely under a continuing violation theory. "To establish a continuing violation [a plaintiff has] to show 'a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period.'" *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480 (9th Cir. 1989) (citations omitted and brackets in original). A precondition of a continuing violation theory is that some violation must have occurred within the limitations period – here, after November 4, 1996. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889 (1977). Even if the plaintiffs can establish an adverse employment action or violation of § 1983 within the limitations period, the statute of limitations will not be tolled for the time barred events unless they are all of a piece within the timely claim. They must be "related closely enough to constitute a continuing violation." *Green*, 883 F.2d at 1480-81 (quoting *Berry v. Bd. of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983)).

The Riggs take a rather cavalier approach to their burden of showing a continuing violation and do little to identify an adverse employment action which arises

within the limitations period.[11] The Riggs explicitly point only to Maddock's February 1997 response to the Riggs' request for protection and paid administrative leave. Plaintiffs may also be relying on four other incidents: Myers' alleged inaction in protecting the Riggs from retaliation; Gomez's alleged inaction in protecting the Riggs from retaliation; Merkle's alleged supervision of McClure's investigation; or Merkle's alleged inaction in protecting the Riggs from retaliation.

In § 1983 actions involving supervisor liability, plaintiff may not rely on vicarious liability theories or a showing of negligence:

> Liability under section 1983 arises only upon a showing of personal participation by the defendant. *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir.1979). A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them. There is no respondeat superior liability under section 1983.

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[11] The plaintiffs contend: "Simply identifying individual affirmative acts, and indifference, is insufficient, because the string of events is what added up to make the entire situation ultimately untolerable." (Pls.' Opp. at 20:8-10.) This statement confuses the plaintiffs' evidence with what is the ultimate issue. To advance a continuing violation theory, they must establish some violation during the limitations period which is attributable to one of the individual defendants named in this lawsuit. In making this showing, they may rely on a "string of events" and circumstances stretching back before the limitations period. However, on a motion for summary judgment that puts the statute of limitations at issue, plaintiffs may not punt on their burden of showing some adverse action within the statute of limitations by vague references to time barred events.

Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); *see also Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (holding supervisor liable only "for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivations of which the complaint is made; or for conduct that showed a reckless or callous indifference to the rights of others") (internal citations, quotations, and brackets omitted). Without a showing of personal participation by the defendants, the Riggs' complaint would become in effect a claim against the CDC and its policies in violation of *Monell* and the Eleventh Amendment. *See Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992) ("To hold cities liable under section 1983 whenever policymakers fail to overrule the unconstitutional discretionary acts of subordinates would simply smuggle respondeat superior liability into section 1983. . . . We decline to endorse this end run around *Monell*."); *see also Weisbuch v. County of Los Angeles*, 119 F.3d 778, 781 (9th Cir. 1997); *Will*, 491 U.S. at 64, 109 S. Ct. at 2308.

Therefore, the Riggs must first show either some personal participation by the defendants in the alleged acts of retaliation, or that the defendants knew of the ongoing retaliation and deliberately failed to prevent it. The court must view the evidence in the light most favorable to plaintiffs. Nonetheless, even on such a view, the Riggs do not meet their burden for any of their allegations within the limitations period.

1. Thomas Maddock's Response to the Riggs' Request for Protection and Paid Administrative Leave

On January 23, 1997, the Riggs sent a letter to defendant Thomas Maddock, interim director of the CDC, requesting protection and paid administrative leave or a transfer to an assignment outside of the institutions division of the CDC. (Pls.' Exh. 41.) This letter was sent just two days after Maddock assumed the duties of interim director, and it was the only communication Maddock received from the Riggs during his tenure at the CDC. (Maddock Decl. ¶ 13.) Prior to being named the interim director of the CDC, Maddock was the Undersecretary of the California Youth and Correctional Agency, a position he continued to hold while he served as interim director.

Upon receipt of the Riggs' January 23, 1997 request, Maddock felt that an immediate response was required because his "personal reaction to the letter was that two of [the] CDC's employees had expressed concern that they faced possible physical harm." (*Id.* ¶ 14.) As a result, Maddock ordered "CDC investigators [to] . . . immediately determine whether [the Riggs] were in fact facing [a] physical threat and danger." (*Id.* ¶ 15.)

Maddock did not, however, order a separate investigation of the alleged retaliation against the Riggs. According to Maddock, it was not appropriate for the director of the CDC to personally intervene in an ongoing investigation of alleged retaliation against the Riggs. (*Id.* ¶ 16.) Rather, it was his duty to ensure that the preexisting investigation was conducted appropriately. Maddock states that he did so by contacting the management of High Desert Prison and instructing the CDC's Special Services Unit to review

the ongoing investigation to assure its adequacy. (Pls.' Exh. 42.) Plaintiffs offer no conflicting evidence.

Thus, Maddock's primary response was directed to the Riggs' immediate physical safety.[12] He notified the Riggs of the ongoing investigation by letter on February 12, 1997,[13] and urged the Riggs to forward any additional pertinent information to the Special Services Unit and to contact

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[12] The Riggs' January 23, 1997 letter is primarily a request for physical protection, not a request for protection from alleged retaliation and harassment. (Pls.' Exh. 41.) Maddock's action directly addressed this primary concern. (Maddock Dep. 141-78.) He sent an investigator to determine what the threats to the Riggs' physical safety were, and the Riggs indicated that they did not feel physically threatened.

At his deposition, Maddock explained his rationale for focusing upon the highlighted physical threat rather than the more subtle retaliation references in the letter:

> Retaliation is not something that's allowed or permitted in the department. But with – but with a department of 45,000 employees, there are cases of harassment and cases of retaliation that happen. They're not allowed; they're against the rules. But there are processes in place to investigate and respond to those.
>
> While physical threats, life, limb threats – you don't want to sit around and wait for standard processes to get to those. You want people to find out now if there is a physical threat. I'm trying to show you a distinction between the two types.
>
> I was concerned personally for the physical safety of the employees. Once it was resolved that that was not a threat, or not even a request by the employees, I felt comfortable that the staff, whose job it is to look into these things, could take care of it.

(Maddock Dep. at 171:3-19.)

[13] Maddock did not write the letter. It was drafted by one of his subordinates. However, the letter was drafted under Maddock's instructions. (Maddock Dep. at 157:19-158:4.)

M.T. Pickett, the Regional Administrator-North of the CDC, if they had any questions. (Pls.' Exh. 42.) Further, Maddock stated that the Riggs' request for paid administrative leave or a transfer was "premature" because the Riggs were both on sick leave at that time. (*Id.*) Maddock noted: "Alternate work site placement would be most appropriately discussed with you after completion of the [Special Services Unit] investigation." (*Id.*) Notably, Maddock did not rule out the possibility for either paid administrative leave or a transfer in the future.

In late February or early March 1997, after sending his response, Maddock reviewed the Special Services Unit's report for the investigation he had ordered into the Riggs' physical safety. The report concluded:

> As previously stated, upon interview, Lt. RIGG's request for protection has been re-stated by him to be a request for protection from what he feels is an ongoing pattern of harassment. Lt. RIGG adamantly indicated he is not in fear for his safety nor has he or his wife suffered any type of physical retaliation, reprisals or threats thereof.

(Maddock Decl., Exh. C.) After reading this report, Maddock "concluded that the [Special Services Unit] had generally completed the task [he] had ordered. [Maddock] did not request a follow up report because [he] was satisfied with the thoroughness of this report." (Maddock Decl. ¶ 21.)

The crux of the Riggs' claim against Maddock is that Maddock's February 12, 1997 response to the Riggs' request for protection was deficient because Maddock did not personally address the alleged acts of retaliation and because he did not approve the Riggs' request for paid

administrative leave or transfer. As a consequence, the Riggs' argue that they had no option but to retire from the CDC when their sick leave credits were extinguished.

The Riggs do not contend that Maddock personally participated in or directed the alleged retaliation. To the extent that they would assert than Maddock's provisional denial of paid leave or a transfer was itself retaliatory, they provide no evidence from which a jury reasonably could find that this was an adverse action when both plaintiffs were already on sick leave. Nor do the Riggs come forward with sufficient evidence to find that Maddock's response to the letter was so inadequate as to amount to a constitutional violation. Therefore, the Riggs must show that Maddock knew of the retaliation and failed to act to prevent it. Upon receipt of the Riggs' letter, written just two days after he assumed the duties of interim director, Maddock ordered the Special Services Unit to ensure the Riggs' physical safety. He also directed a review of the ongoing investigation of the alleged retaliation against the Riggs. The Special Services investigation determined that there was no threat to the Riggs' physical safety, and the Riggs acknowledge that they did not feel threatened. (D. Smith Decl. ¶ 6; S. Rigg Dep. at 739:3-14.)

This conduct does not amount to reckless or callous indifference to the Riggs' claim of retaliation. It is undisputed that the director of the CDC has an office in Sacramento, not in the individual prisons, and is responsible for 45,000 employees. Rigg was not under Maddock's direct or immediate supervision. Rather, there were layers of supervision between the Riggs and Maddock including a chief deputy director, deputy directors, a warden, a chief deputy warden, deputy wardens, and captains. Moreover, none of the Riggs' many allegations of retaliation or

harassment occurred after Maddock assumed the duties of the interim director.[14] Thus, Maddock could not "have failed to act to prevent them." *See Taylor*, 880 F.2d at 1045. They had already occurred. In short, the Riggs fail to show that Maddock either retaliated against them himself or condoned the retaliation of others. Their disagreement with his management decision does not create an issue of fact as to whether these decisions violate the First and Fourteenth Amendment. Plaintiffs' specious claim against Maddock will not form an anchor for their continuing violations theory.

2. Eddie Myers' Inaction in Protecting the Riggs From Retaliation

The Riggs' claim against Eddie Myers, then the chief deputy director for the CDC, is nearly identical to their claim against Maddock. If anything, the claim is more attenuated because Myers never received the Riggs' January 23, 1997 request for protection. (Myers Dep. at 96:5-97-13.)[15] Nonetheless, the Riggs claim that Myers should have protected them from retaliation even though

[14] The last alleged incident of retaliation is the allegation that Sergeant Shepard told Judy Rigg, "Why doesn't your old man quit telling on people, he is only going to get himself killed." (Pls.' Exh. 37.) That incident allegedly occurred on January 16, 1997, five days prior to Maddock's arrival. However, this allegation was conclusively proven to be untrue because Judy Rigg denied that Shepard had ever made such a comment.

[15] At his deposition, counsel for the plaintiffs referred to the Riggs' January 23, 1997 letter as having been addressed to Myers. (Myers Dep. at 96:5-10.) That letter was not addressed to Myers. (Pls.' Exh. 41.)

there is no evidence that Myers either knew of the alleged retaliation or failed to act.[16] On this ground, therefore, the plaintiffs' claim against Myers is reduced to a respondeat superior theory, which cannot support a claim under § 1983.

3. Gomez's Inaction in Protecting the Riggs From Retaliation

James Gomez was the director of the CDC prior to Thomas Maddock; Gomez retired on January 16, 1997. Therefore, any liability for Gomez, within the limitations period, must have occurred between November 4, 1996 and January 16, 1997. The Riggs have offered no evidence that Gomez personally participated in any of the alleged retaliation against them during this period. Rather, the Riggs argue that Gomez should have acted in a different manner.[17] Just as such general allegations were insufficient with respect to Maddock and Myers, they are insufficient with respect to Gomez as well.

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[16] In 1994, Myers appears to have signed a response to one of Steve Rigg's grievances. (Pls.' Exh. 19.) This one document, significantly outside of the limitations period, does not establish that Myers knew of a pervasively retaliatory environment in Corcoran and failed to act. Further, there is no evidence in the cited record that Rigg requested any protection from retaliation from Myers.

[17] For example, the plaintiffs make the following arguments: "One of the Director's duties is to provide a safe working environment for prison employees." (Pls.' Opp. at 60:12-13.) This appears to be an argument for respondeat superior liability.

4. William Merkle's Supervision of McClure's Investigation and Merkle's Inaction in Protecting the Riggs From Retaliation

William Merkle was the warden of High Desert Prison until he retired on December 30, 1996. Therefore, any liability for Merkle, within the limitations period, must have occurred in the short time period between November 4, 1996 and December 30, 1996. However, the Riggs make no allegation of any personal participation by Merkle in any of the alleged acts of retaliation in November and December 1996. Instead, the Riggs advance the following theory: "Merkle's failure to determine whether the investigation was adequate and whether constitutional violations were occurring, coupled with his acquiescence in an inadequate investigation, can serve a basis for individual liability." (Pls.' Opp. at 48:4-6.)

Three alleged acts of retaliation occurred at High Desert Prison in late 1996. The first was the alleged discovery of a newspaper photograph of Steve Rigg with rat ears and rat tail.[18] The second was the alleged inmate identification card with Steve Rigg's photograph attached and the phrase "I be tellin." The third was Judy Rigg's claim that she received a punitive job change. The first two allegations were investigated but the investigations were inconclusive because the alleged photographs were never found. The third investigation did not support Judy Rigg's claim because it found that her transfer was due to her lack of seniority for her current position. (Petticord Decl. ¶ 7.)

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[18] It is unclear if this even occurred within the limitations period, since it may have occurred prior to November 1996.

The claim that Merkle did not respond to these alleged acts of retaliation is without support in the record. At the time that these allegations occurred, Merkle, nearing his retirement, had delegated many of his assignments to Chief Deputy Warden Richard Gile. (Gile Decl. ¶ 2.) Merkle assigned Nancy McClure to investigate each allegation of retaliation. According to plaintiffs, McClure was not competent because she lacked sufficient experience. But there is no evidence or reason to think that a more experienced investigator could have located these two elusive, possibly apocryphal items. Nor is there evidence that a more experienced investigator would have come to a difference conclusion concerning Judy Rigg's seniority. The record does not support the accusation that, by assigning McClure, Merkel ordered a biased, inadequate investigation. Further, Merkle instructed Gile to monitor the investigations, and Gile assumed responsibility for them. (*Id.* ¶ 8.) None of the investigations was even concluded prior to Merkle's last day as High Desert warden. (*Id.*) All of this is undisputed. Plaintiffs fail to meet their burden of showing that the investigations were manifestly inadequate or deficient, (S. Rigg Dep. at 664:4-665:25), or that Merkle intended the investigations to be inadequate, if in fact they were. In such circumstances, Merkle cannot be found to "have failed to act to prevent" retaliation. *Taylor,* 880 F.2d at 1045. As a result, there is no violation by Merkle within the limitations period, and the continuing violation theory does to save the plaintiffs' claims.[19]

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[19] Even if Merkle's inaction were to constitute a violation within the limitations period, it would not save all the plaintiffs' allegations.

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C. Conspiracy to Violate Civil Rights

Federal rather than state law determines the time of accrual for § 1983 conspiracy claims. *See Gibson v. United States,* 781 F.2d 1334, 1340 (9th Cir. 1986). Injury from a civil conspiracy flows from the overt acts rather than the continuance of the conspiracy. *See id.* "Consequently, the cause of action runs separately from each overt act that is alleged to cause damage to the plaintiff. . . . " *Id.* Thus, under their theory that the defendants conspired to violate their civil rights under § 1983, the Riggs can only recover damages for overt acts that occurred during the limitations period. *See id.* But the supposed overt acts are the same alleged acts and failures to act discussed above. Therefore, the conspiracy allegation does not toll plaintiffs' claims permitting them to reach back in time beyond the one year limitation. Since the plaintiffs do not meet their burden of showing overt acts within the statute of limitations, the conspiracy claim is itself time barred.

D. Conclusion

The Riggs' claims are untimely. First, the equitable tolling doctrine does not apply to the 1994 allegation against Warden Smith based on Rigg's workers' compensation claim. Second, the continuing violations theory does not apply because plaintiffs have not come forward with adequate evidence from which a jury could find any

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At most, it could toll the limitations period as to the claims against Merkle that occurred at High Desert and not the claims against the other defendants at Corcoran and Sacramento in different institutions and offices. *See Green*, 883 F.2d at 1480-81.

violation by any of the defendants during the limitations period.

The Riggs' claims in this suit are an attempt to impose respondeat superior liability upon supervisors under § 1983. Because § 1983 does not permit liability on this basis and because the evidence as to the supervisor defendants is not adequate to show personal involvement, the court finds that all the Riggs' claims are barred by the statute of limitations.

IV. First Amendment

Even if the Riggs' claims were timely, the defendants would be entitled to summary judgment on all claims but one on alternative grounds. To pursue a public-employee First Amendment retaliation action, the Riggs must first show that they suffered an adverse employment action as a result of the defendants' conduct. *See Nunez v. City of Los Angeles,* 147 F.3d 867, 874-75 (9th Cir. 1998). The loss must be tangible, *see id.* at 875, such as the denial of a promotion or a punitive job change, *see Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach,* 881 F.2d 816, 818-19 (9th Cir. 1989); *Allen v. Scribner,* 812 F.2d 426, 434-35 (9th Cir. 1987), and greater than "[m]ere threats or harsh words." *Nunez,* 147 F.3d at 875.[20]

[20] In the context of Title VII, the Ninth Circuit has held "that an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity." *Ray v. Henderson,* 217 F.3d 1234, 1243 (9th Cir. 2000). That reasoning is inapplicable to a public employee First Amendment retaliation action because under *Pickering,* a public employee's right to speech is not absolute and is subject to balancing competing state interests which

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The Riggs must also prove that Steve Rigg's speech was constitutionally protected and that his protected speech was a substantial or motivating factor for an adverse employment action. The speech at issue must involve a matter of public concern,[21] and the interest in expression "must outweigh the State's interest in promoting workplace efficiency and avoiding workplace disruption." *Brewster v. Bd. of Education,* 149 F.3d 971, 978 (9th Cir. 1998); *see also Pickering v. Bd. of Education,* 391 U.S. 563, 88 S. Ct. 1731 (1968). Whether the defendants' interest in workplace efficiency outweighs the plaintiffs' need to speak out "involves a fact-sensitive inquiry involving the totality of the circumstances." *Gilbrook v. City of Westminster,* 177 F.3d 839, 868 (9th Cir. 1999).[22] Further, the defendants

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include workplace efficiency and morale. *See Brewster v. Bd. of Education,* 149 F.3d at 978. That "balancing" has never been considered in the context of Title VII.

[21] The defendants concede that Steve Rigg's speech concerned a matter of public concern.

[22] The Ninth Circuit has held that the following factors are considered, although none is dispositive:

> In balancing competing interest, this court has considered a host of factors. We have inquired whether the speech (1) impaired discipline or control by superiors; (2) disrupted coworker relations; (3) eroded a close working relationship premised on personal loyalty and confidentiality; (4) interfered with the speaker's performance of his or her duties; or (5) obstructed routine office operations. "[P]ublic employers need not allege that an employee's expression actually disrupted the workplace; 'reasonable predictions of disruption' are sufficient." Moreover, this court has weighed (6) whether the speaker directed the statement to the public or the media, as opposed to a governmental colleague; (7) whether the speaker served in a high-level, policy making capacity; and (8) whether the statement was false or made with reckless disregard to the truth.

Id. at 867-68 (internal citations omitted).

can avoid liability if they can show that they would have taken the same actions in the absence of the protected speech. *See Brewster,* 149 F.3d at 978.

Finally, even if the Riggs can establish a constitutional deprivation, the defendants may still be entitled to qualified immunity. An official is entitled to qualified immunity if the law was not clearly established, or, if the law was clearly established but the official's conduct was nonetheless reasonable. *See Katz v. United States,* 194 F.3d 962, 967 (9th Cir. 1999). "Because, under *Pickering,* the determination whether an employee's expression is constitutionally protected requires a fact-sensitive, context-specific balancing of competing interest, the law regarding public-employee free speech claims will 'rarely, if ever, be sufficiently "clearly established" to preclude qualified immunity. . . . '" *Brewster,* 149 F.3d at 979-80 (citations omitted). The relevant right is not the generic First Amendment right to free speech. Rather, it is whether the plaintiffs' right to free speech clearly outweighed the defendants' interest in avoiding workplace disruption. *See Moran v. State of Washington,* 147 F.3d 839, 845 (9th Cir. 1998). Thus, defendants may be entitled to qualified immunity if they can show that the *Pickering* test did not "clearly" favor Rigg in the fact specific context. *See id.* at 981.

Notably, with the exception of one allegation, the Riggs are unable to point to evidence that any of the alleged adverse employment action would not have been taken in the absence of Steven Rigg's protected speech. The Riggs also fail to show a nexus between any of the alleged adverse employment actions and Steve Rigg's speech. Finally, to the extent that any claim survives, the defendants would be entitled to qualified immunity.

A. George Smith

Steve Rigg has seven allegations against Warden Smith: (1) that Rigg was threatened with termination for going outside the chain of command when he first complained to the CDC headquarters about Corcoran's shooting policy; (2) that Smith prevented Rigg from training officers after Rigg criticized Corcoran's shooting policy; (3) that Smith prevented Rigg from receiving training at Galt Academy; (4) that after Smith learned Rigg was a whistleblower, he gave Rigg a punitive job change; (5) that Rigg's request to transfer to Pleasant Valley Prison was blocked by Smith; (6) that Priscilla Chavez retaliated against Rigg on the orders of Smith by giving Rigg a punitive job change at High Desert; and (7) that Smith verbally retaliated against Rigg at the October 31, 1994 staff meeting. Judy Rigg has no allegations against Smith.

First, there is no evidence that Smith threatened Rigg with termination for going outside the chain of command. *See Taylor,* 880 F.2d at 1045 ("A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them."). Rather, Rigg only has testified that two associate wardens threatened him. (S. Rigg Dep. at 285:6-286:10.)

Second, Rigg does not show that forbidding him from training officers on the shooting policy amounts to an adverse employment decision.[23] Rigg may have enjoyed the

[23] There is conflicting testimony as to whether Rigg decided to stop training officers or as to whether Smith ordered Rigg to do so. In a letter from Rigg to Smith it appears that Rigg decided to no longer train officers in October 1994 because Rigg was afraid of "vicarious liability"

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training and may have perceived a rebuke in being told to stay away from this subject, but the record does not show that the lightening of Rigg's duties affected the terms of his employment. Moreover, the accusation falls within the qualified immunity doctrine. By his own admission, Rigg was either training Corcoran officers in a manner that was contrary to the rules that Smith had established or was training them according to Smith's instructions but contrary to his own beliefs. Rigg expressed his disagreement with the Warden's policy and told the Warden that he was uncomfortable training officers according to the policy. The Warden's response in removing Rigg from that duty was reasonable and predictable.

Under the *Pickering* test, it would be disruptive for a range instructor to openly oppose the institution's firing policy. Similarly, it would be disruptive to force an instructor who believed that the policy was wrong and exposed him to personal liability to continue teaching. The Warden reasonably could conclude that these were not circumstances conducive to effective and reliable teaching in an area of critical importance. In these circumstances, Smith is entitled to qualified immunity for such a judgment call.[24] *See Moran,* 147 F.3d at 850.

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as an instructor of Corcoran's shooting policy. (Pls.' Exh. 20, Letter from S. Rigg to Smith, May 22, 1995.) On the other hand, Smith claims that Rigg was prevented from training officers because he was doing the training incorrectly. (Smith Dep. at 53:6-13.)

[24] Rigg's May 22, 1995 letter to Smith demonstrates the disruption. He wrote: "Due to the vicarious liability a firearms instructor is subjected to, and considering the conflict and confusion pertaining to appropriate shooting and firearms policy at Corcoran, it was in my best interest not to instruct range." (Pls.' Exh. 20.) Given Rigg's beliefs, it is

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Third, Rigg claims that Smith prevented him from receiving training at Galt Academy in retaliation for his speaking out against the shooting policy. (S. Rigg decl. ¶ 28.) Rigg offers no evidence, however, that Smith gave these orders as opposed to the various associate and deputy wardens who appear to have had more contact, and more acrimonious contact, with Rigg than Smith. There is no evidence that Smith knew about or approved any decision concerning Rigg and training.

Fourth, on October 8, 1994, Rigg was reassigned from his position as a 4-A/Special Housing Unit Lieutenant to the position of a 3-A Relief Lieutenant. (S. Rigg Decl. ¶ 14.) Rigg claims that this reassignment was a punitive job change, although it involved no loss of pay or of any other tangible benefit. (*Id.*) There is no direct evidence that Rigg's speech was a substantial or motivating factor behind the transfer. Instead, Smith states that he ordered the reassignment because Rigg was removing documents – an act Rigg acknowledges he committed. (Smith Dep., *Caruso v. California,* at 143:21-144:10.) Although this is a weak claim, since Smith acknowledges transferring Rigg around the time of the protected speech, the claim could go forward were it not barred by the statute of limitations.

Fifth, Rigg claims that his transfer to Pleasant Valley Prison was blocked by Smith. However, Rigg cites no admissible evidence[25] that his transfer was blocked by

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easy to see how his teaching range would be disruptive. *See Gilbrook,* 177 F.3d at 868.

[25] Rigg's evidence is hearsay, and it does not even provide a link between the alleged blocked transfer and Smith. The evidence can be

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anyone in Corcoran, let alone Smith. In fact, Smith later approved a transfer for Rigg to high Desert Prison. Without evidence that Smith blocked the transfer, Rigg's unsupported argument does not meet his burden.

Sixth, Rigg claims that Smith orchestrated a punitive transfer after Rigg left Corcoran and was at High Desert on June 10, 1996. Rigg claims that his supervisor at High Desert, Priscilla Chavez, requested that he be transferred from the Administration Segregation Unit to the position of relief lieutenant because Chavez was one of Smith's proteges. (S. Rigg Decl. ¶ 39.) Chavez claims that she requested that Rigg be reassigned only after she was informed that Rigg had asked to use oleoresin capsicum gas on an inmate who was already under staff control in double restraints – essentially an excessive force charge. (Chavez Decl. ¶ 3.) Plaintiff's claim against Smith concerning this transfer is frivolous. There is no evidence that Smith – who was not the Warden at High Desert and had retired from the CDC – had anything to do with Chavez's decision. Permitting the claim to go forward against Smith simply on the claim that Chavez liked Smith would be a perverse form of respondeat superior liability that has no place under § 1983. Further, even if Rigg could show that Smith was in some manner responsible, Rigg has done little to discredit Chavez's declaration.[26] As a result, even assuming Smith was somehow calling the shots at High Desert after his retirement from Corcoran and the CDC,

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fairly characterized as one officer told another officer that Rigg's transfer had been stopped at Corcoran. (Novencido Dep. at 42:21-22.)

[26] Rigg only claims that the charges were not accurate. (S. Rigg Dep. at 552:3-19.)

Rigg fails to show that his protected speech was the substantial or motivating factor in the transfer. *See Brewster,* 149 F.3d at 978.

Seventh, Rigg claims that he suffered an adverse employment action on October 31, 1994, when Smith complained at a staff meeting about "anonymous sources" who had talked to the Press and who alleged wrongdoing against individual named officers. At the meeting, Smith stated that he was "'mad as hell,' that people would do something like this to their fellow staff members to jeopardize their lives and not have – have enough intestinal fortitude to give their names and hide behind anonymity," and that the unidentified sources were like "kids throwing rocks while hiding behind their mother's skirts." (*Id.* at 67:12-16, 69:20-24.) At the time of the staff meeting, Smith believed that Rigg was one of the unidentified sources, (*id.* at 65:11-15), but "never mentioned anybody by name" at the meeting. (*Id.* at 67:16-17.) Smith argues that he made the speech in order to boost morale. (Pls.' Exh. 9, Smith Dep., *Caruso v. California,* at 63:25-64:20.)

To amount to an adverse employment action, Smith's comments must have resulted in a tangible loss of a valuable government benefit. "Mere threats and harsh words are insufficient." *Nunez,* 147 F.3d at 875.[27] Here no threat was made, nor was Rigg named as the informant. While Rigg may have been uncomfortable that his actions were criticized, the Warden did no more than dispute

[27] "It would be the height of irony, indeed, if mere speech, in response to speech, could constitute a First Amendment violation." *Id.* (holding that verbal threats and bad-mouthing were insufficient adverse actions).

newspaper articles and decry anonymous attacks, a time honored response in such situations. Smith's comments, therefore, do not constitute an actionable adverse employment action against Rigg. Further, even if Smith's comments at the October 31, 1994 staff meeting could be viewed as an adverse action, Smith would be entitled to qualified immunity.

Rigg's anonymous speech to the media identified a number of Corcoran correctional officers and accused them of misconduct. In rebuttal, the Warden was entitled to exercise his own free speech rights by denying the accusations and verbally castigating those who had made them,[28] *See Gilbrook,* 177 F.3d at 867-68. The First Amendment is not a one way street. In these circumstances, it cannot be said that "the *Pickering* test so clearly favors [Rigg] that it would have been unreasonable for [Smith] to believe that [his comments were] lawful." *Brewster,* 149 F.3d at 981.[29]

B. Thomas Maddock

As discussed in Part III.B.1 *supra,* the plaintiffs have not connected Maddock to an adverse employment action.

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[28] Smith indicated that the staff was "very upset" after the newspaper articles quoting the anonymous sources were published. (Pls.' Exh. 9, Smith Dep., *Caruso v. California,* at 65:18-20.) Further, Smith was concerned that the reckless identification of correctional officers by the anonymous sources placed the identified officers' lives in jeopardy from retaliation by inmates' associates outside the prison. (*Id.* at 66:3-67:1.)

[29] While Warden Smith's speech might have been actionable in the context of a Title VII retaliation claim, Title VII retaliation analysis is different from the analysis of a public employee First Amendment retaliation action. *See* note 20 *supra*.

Nonetheless, even if the plaintiffs were able to maintain a supervisor liability action, Maddock would be entitled to qualified immunity. It is undisputed that Maddock responded to the plaintiffs' January 23, 1997 request for protection.[30] He assigned investigators to assure the Riggs' personal safety. He asked that ongoing investigations be continued. Even if Maddock could have done more, plaintiffs fail to rebut Maddock's showing that what he did was reasonable in the circumstances and should entitle him to qualified immunity from plaintiffs' retaliation claim.

C. Eddie Myers and James Gomez

As discussed in Part III.B.2 and Part III.B.3 *supra*, the plaintiffs have not connected either Myers or Gomez to an adverse employment action within the limitations period. Similarly, prior to November 4, 1996, the plaintiffs' supervisor liability claim fares no better in establishing personal participation by Myers or Gomez, or that either knew of retaliation against the Riggs. *Larez,* 946 F.2d at 646.

A distinguishing characteristic between the Riggs' supervisor liability lawsuit and other lawsuits which have been permitted to go forward under the same theory is that the Riggs assume that the defendants Maddock, Myers, and Gomez – the highest ranking officials within the CDC – "must have known" to search for a retaliatory

[30] In cases such as *Bator v. State of Hawaii,* 39 F.3d 1021 (9th Cir. 1994), the Ninth Circuit has declined to extend qualified immunity to a supervisor liability claim where the supervisor had notice of the alleged harassment and took absolutely no action. *See id.* at 1029. Plaintiffs do not dispute that Maddock took action when they requested protection.

environment against the Riggs merely because the Riggs were talking to the press and the FBI. In cases finding supervisor liability, the alleged harassment either pervades the supervisor's immediate zone of supervision,[31] or is reflected in the supervisor's policies or practices.[32] Here, however, plaintiffs' attempt to pin liability on the highest officers in the CDC is practically indistinguishable from respondeat superior liability. Maddock, Myers, and Gomez were in Sacramento rather than Corcoran or High Desert, and were not directly supervising either the plaintiffs or the plaintiffs' supervisors. Further, the plaintiffs have produced no evidence of any pattern or practice implemented by these defendants which could create liability. To the extent that either Myers or Gomez learned of incidents of alleged retaliation against the Riggs, they directed them to be addressed by the normal chain of command and procedures in place. They were not placed on notice of a "pervasive" retaliatory environment. At the very least, these defendants establish their entitlement to qualified immunity.

D. William Merkle

As discussed in Part III.B.4 *supra,* the plaintiffs have not connected Merkle to an adverse employment action within the limitations period. However, even if Merkle's

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[31] For example, in *Bator*, the plaintiff's supervisor witnessed some of the alleged harassment and was continually told by the plaintiff of harassing incidents when they occurred. In one instance the supervisor even "rammed" into the plaintiff after being told of the harassment. *See Bator,* 39 F.3d at 1024.

[32] *See Larez*, 946 F.2d at 646.

assignment of McClure to investigate the alleged retaliation against the Riggs were to constitute an adverse employment action, a dubious claim indeed, Merkle would nonetheless be entitled to qualified immunity. There are no factual disputes as to the actions that Merkle took in response to the alleged retaliation. When he learned of the alleged retaliation, he assigned someone to investigate them. Plaintiffs assert that McClure was not an experienced investigator. They do not allege, however, that she was biased against them or that Merkle believed or had reason to believe that she was incompetent. Merkle's decision to assign McClure to the investigation is the sort of discretionary decision well within the protection of qualified immunity.

Independent of the Riggs' allegation within the limitations period, the Riggs have five additional time-barred claims against Merkle: (1) that Steve Rigg was given an initial assignment at High Desert that was not commensurate with his experience and skills; (2) that Rigg was punitively transferred by Merkle from the Administrative Segregation Unit to the position of relief lieutenant; (3) that Merkle did not investigate inflammatory documents directed at Rigg that were sent to the prison from unknown individuals; (4) that Rigg was given a conduct violation in retaliation for his speech; and (5) that Judy Rigg was retaliated against when four or five male officers refused to assist her when she was supervising inmates unloading a food truck. These claims lack merit or evidentiary support.

First, Rigg claims that prior to his transfer from Corcoran to High Desert he was told that he would be designated an assignment lieutenant, (S. Rigg Decl. ¶ 30), and that the actual assignment he received was that of

relief lieutenant. Rigg claims that the latter assignment was not commensurate with his experience, and that other lieutenants with less seniority were given more desirable positions. (*Id.* ¶¶ 30-33.).[33] The court will assume that the relief lieutenant assignment was an adverse employment action, although the positions were the same in terms of rank and pay. But Rigg does not provide evidence that Merkle made the assignment. It is disputed as to who, if anyone, told Rigg that he would be an assignment lieutenant at High Desert,[34] and Rigg does not proffer any evidence to show that Merkle either was responsible for or knew about the assignment.

Second, Rigg argues that Merkle was responsible for approving Chavez's request to transfer Rigg from the Administration Segregation Unit back to the position of relief lieutenant. However, as previously discussed, the impetus behind the transfer was Chavez's excessive force claim against Rigg. Even assuming that Chavez lied or had an improper motive in seeking Rigg's transfer, there is no evidence that Merkle relied upon anything other than

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[33] Rigg argues that Merkle's statement that Rigg was a "trouble-maker" indicates that Rigg's speech was the motivation behind his transfer, providing a nexus between an adverse action and protected speech. (Novencido Dep. at 63:16-64:1.) Assuming the statement was made and that Merkle disliked Rigg, there is no showing that the statement was made before the assignment of Rigg or that Merkle was involved in the assignment.

[34] Rigg claims that Novencido told him that he would be an assignment lieutenant. (S. Rigg Dep. at 533:10-15.) Notably, Novencido does not recall what Rigg's initial assignment was or whether he would have promised Rigg a particular position prior to Rigg's arrival at High Desert. (Novencido Dep. at 62:2-19.) Novencido does not state that Merkle caused Rigg to be assigned to a less desirable position.

Chavez's charge or acted in any way out of the ordinary in approving Chavez's request that Rigg be reassigned. (Merkle Decl. ¶ 11; S. Rig Dep. at 714:21-715:12.)

Third, Rigg complains that there was no investigation of some unsolicited documents that were critical of Rigg, which were sent on June 4, 1996 to Captain D. Peterson via a fax machine located outside the prison. The senders only identified themselves as "California Taxpayers" and claimed no affiliation with the CDC. (Pls.' Exh. 29.) The documents stated:

> *Lt. Steve Riggs*: He steals state documents goes to the FBI and CNN (2 times) His complaint didn't like Jim Gomez's shooting policy, thought it was too abusive – You don't really think he cared one little bit about the shooting policy do you? What it was, he was an unhappy camper for some reason, so he says, "I'll fix them". Articles from local newspapers are enclosed. Guess what? No adverse action taken, unless you feel transfering him with all expenses paid to High Desert Prison in Susanville is a punishment.

(Pls.' Exh. 29.) Peterson gave the documents to Merkle. (*Id.*) While Merkle's failure to investigate these documents might be evidence of his dislike of Rigg, the inactivity cannot be viewed as an adverse employment action. The documents in question were sent from outside the prison and there is no evidence to suggest that the documents were sent by CDC employees. Moreover, a prison guard who goes public with serious accusations against the institution acts courageously in part because of expected fallout and criticism. The First Amendment cannot and ought not erect a wall around Rigg immunizing him from disagreement and criticism. Indeed, were the Warden to

investigate all criticism of Rigg, including criticism ostensibly from members of the public, he would justly be accused of chilling the speech rights of others. Finally, even if it could be said that Merkle's failure to investigate was a constitutional deprivation, Merkle would be entitled to qualified immunity. A reasonable warden could believe it unnecessary and unwise to investigate documents that criticized an employee and the CDC and which originated outside the prison.

Fourth, Rigg claims he suffered from an adverse employment action when, on September 18, 1996, he received a conduct violation for making the comment that some officers were "crooked cops." (Pls.' Exh. 28.) This violation was given because Rigg himself admitted to making the comment, and, although he claims that it was not directed at any particular officers, some inmates who overheard the comment and were interviewed indicated to the contrary. (*Id.*) Since Rigg made the comment in question, and does not contend that the comment was protected speech, Rigg fails to meet his burden of showing that the conduct violation was retaliation for Rigg's statements to the media or the FBI. Further, Merkle would be entitled to qualified immunity because he relied upon Cal. Code Regs. § 3391 in issuing the conduct violation.[35]

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[35] To the extent that Rigg argues that his protected speech was the comment "crooked cops," his claim does not survive the Pickering balancing test. Calling his fellow officers "crooked cops" undoubtably would disrupt workplace efficiency in the prison context where correctional officers rely upon one another. Further, Rigg's comment in front of inmates would not constitute a broad audience which could favor finding his speech protected.

Fifth, Judy Rigg alleges that four or five male officers refused to assist her when she was supervising inmates who were unloading a food truck.[36] (J. Rigg Decl. ¶ 10.) Rigg contends that this was retaliation for her association with Steve Rigg. McClure investigated this allegation but could not take action because Judy Rigg did not know the names of the officers and could not identify any of them. Further, McClure could not find administrative records of Judy Rigg's location on that day. Ms. Rigg fails to present sufficient evidence to establish an adverse employment action in such circumstances by anyone in a supervisory capacity. She made no complaint until November 1996, even though the event allegedly occurred on September 21, 1996. No evidence connects the alleged incident to defendant Merkle. Even if the incident and its subsequent investigation could somehow constitute an adverse employment action by Merkle against Judy Rigg, Merkle would be entitled to qualified immunity because the incident was investigated once it was reported.

E. Conspiracy to Violate Constitutional Rights

To establish a conspiracy under § 1983, the Riggs must demonstrate "an agreement or 'meeting of the minds' to violate constitutional rights." *United Steel Workers' of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41

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[36] This incident allegedly occurred on September 21, 1996. It was not discovered by a supervisor until Judy Rigg was interviewed by McClure about the alleged punitive job transfer in December 1996 when she alleges that Lieutenant Vaughn transferred her. There is no evidence that Corcoran administration knew about the alleged incident prior to that time.

(9th Cir. 1989) (en banc) (quoting *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983)). A conspiracy can be inferred from circumstantial evidence. All the participants need not know the details of the conspiracy, but they must all share the "common objective of the conspiracy." *Id.* at 1541. The Riggs proffer scant evidence which could support a claim that the defendants all share the common objective of conspiring to violate the Riggs' constitutional rights. Instead, plaintiffs base their claim largely on the alleged inaction of the defendants. This supposed inaction, however, is no more than delegation by high ranking supervisors to other managers and investigators.

Moreover, a predicate to a conspiracy claim under § 1983 is that the plaintiffs must have suffered an actual deprivation of their constitutional rights. *See Dooley v. Reiss*, 736 F.2d 1392, 1395 (9th Cir. 1984); *see also Dixon v. City of Lawton*, 898 F.2d 1443, 1449 (10th Cir. 1990) ("Thus, we join those courts which have recognized that to recover under a § 1983 conspiracy theory, a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights."). Since no constitutional deprivation has been adequately pled and proved within the limitations period, either at the hands of the defendants or others, the Riggs' claim that the defendants conspired to violate their civil rights under § 1983 is without merit.

F. Conclusion

The statute of limitations bars the Riggs' claims. Alternatively, with only the one exception concerning Warden Smith, the Riggs have not presented a case that survives the defendants' summary judgment motion on the merits.

VI.

Plaintiff Rigg may well have acted courageously in stepping forward to oppose various practices within the prison system and at Corcoran prison in particular. He is entitled to protection from retaliation. But he is not insulated from all disagreement or criticism, nor can he recover monetary damages for time barred events from supervisors who were not involved in the particular alleged retaliatory activity.

Accordingly, defendants' motion for summary judgment is GRANTED. The clerk is ordered to enter judgment for the defendants.

IT IS SO ORDERED.

DATED: 29 September, 2000.

/s/ David F. Levi
DAVID F. LEVI
United States
District Judge

United States District Court
for the
Eastern District of California
October 2, 2000

* * CERTIFICATE OF SERVICE * *

2:97-cv-02084

Rigg

v.

State of CA

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on October 2, 2000, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk

BY: /s/ [Illegible]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM STEVEN RIGG, Plaintiff-Appellant, and JUDITH V. RIGG, Plaintiff, v. STATE OF CALIFORNIA, WILLIAM MERKLE; THOMAS MADDOCK; EDDIE MYERS; JAMES GOMEZ, and GEORGE A. SMITH, Defendants-Appellees.	No. 00-17371 D.C. No. CV-97-02084-DFL Eastern District of California, Sacramento ORDER (Filed May 22, 2002)

Before: D.W. NELSON and HAWKINS, Circuit Judges, and FITZGERALD,* District Judge.

The panel has voted to deny the petition for rehearing. Judge Hawkins has voted to deny the petition for rehearing en banc and Judges Nelson and Fitzgerald have recommended denying the en banc petition.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a

* Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.